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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

No.

RICHARD L. DUGGER, et al,

Petitioner,

v.

MACK RUFFIN, JR.,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Supreme Court, U.S.
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154 pp

QUESTION PRESENTED

WHETHER THIS COURT SHOULD ACCEPT JURISDICTION TO SUMMARILY DISPOSE OF THE CASE AS THE DISSENTING OPINION BELOW DISCLOSES THAT THE PANEL DID NOT CONSIDER HARMLESS ERROR IN AUTOMATICALLY VACATING THE DEATH SENTENCE FOR A LOCKETT-HITCHCOCK VIOLATION WHICH IS CONTRARY TO 28 U.S.C. §2111.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners **Richard L. Dugger**, Secretary, Florida Department of Offender Rehabilitation, and **Tom Barton**, Superintendent, Florida State Prison at Starke, Florida and the Respondent, **Mack Ruffin, Jr.** The petition is not filed on behalf of a corporate petitioner.

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No.

RICHARD L. DUGGER, et al,

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MACK RUFFIN, JR.,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, Richard L. Dugger and Tom Barton, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above entitled proceeding on June 20, 1988.

OPINIONS BELOW

The opinion below of the Court of Appeals, Eleventh Circuit, is reported as Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) and appears in the Appendix. That court rendered an Order on August 18, 1988, denying the petition for rehearing en banc. The opinion of the United States District Court is unpublished and excerpts of that opinion appear in the Appendix. Ruffin v. Wainwright, No. 82-196-Civ-Oc-16 (M.D. Fla. May 21, 1986) [Micro Roll No. 109/2578]. Relevant opinions of the Supreme Court of Florida are reported as Ruffin v. State, 397 So.2d 277 (Fla. 1986) [affirming his judgment and sentence]. Respondent's application to this Court for a writ of certiorari was denied. Ruffin v. Florida, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). Also reported is Ruffin v. State, 420 So.2d 591 (Fla. 1982) [affirming denial of Fla. R. Crim. P.

3.850 relief] and Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1981) [application for habeas corpus denied].

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals, Eleventh Circuit was rendered June 20, 1988. A petition for rehearing en banc was timely filed and denied on August 18, 1988. The lower court has rendered an order staying its mandate to and including October 3, 1988.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Title 28, United States Code §2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or

defects which do not affect the substantial rights of the parties.

Title 28, United States Code §2254, Rule 11 provides:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

Title 28, United States Code, Fed. Rules Civ.Proc., Rule 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Title 18, United States Code, Fed. Rules Crim.Proc., Rule 52(a) provides:

> Any error, defect, irregularity or variance which does not affect

substantial rights shall be disregarded.

STATEMENT OF THE CASE

Mack Ruffin, Jr., along with an accomplice, Freddie Lee Hall, kidnapped Karol Lea Hurst, drove Mrs. Hurst, then pregnant, to a remote area where she was raped, pistol whipped, and murdered. The facts of this case are set out both in the state and federal opinions. Ruffin v. State, 397 So.2d 277 (Fla. 1981) [affirming his judgment and sentence] and Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) [district court denial of 28 U.S.C. §2254 relief affirmed in part, vacated in part and remanded with instructions].

The United States District Court for the Middle District of Florida, the Honorable John H. Moore, II, sitting, declined to issue The Great Writ. On collateral appeal to the United States Circuit Court for the Eleventh Circuit, this chronology transpired:

DATE: Jan. 21, 1987

EVENT: Oral argument was heard. One issue on appeal was whether the state trial court had in its instructions as to death penalty or life recommendations precluded the jury from hearing non-statutory mitigating circumstances. The custodian's position was that there was no error; and, that Hitchcock v. Dugger, No. 85-6756 was pending before this Court and might well be dispositive of the claim. The Eleventh Circuit panel at oral argument allowed Mr. Ruffin the opportunity for supplemental briefing on his Enmund v. Florida, 458 U.S. 782 (1982) claim. These supplemental briefs were filed simultaneously.

DATE: April 22, 1987

EVENT: This Court decided Hitchcock v. Dugger, No. 85-6756 (April 25, 1987), 95 L.Ed.2d 347, 107 S.Ct. 1821.

DATE: April 30, 1987

EVENT: Mr. Ruffin filed a Motion for Leave to file a Brief concerning recent United States Supreme Court decision.

DATE: May 4, 1987

EVENT: Judge Hatchett rendered an order denying supplemental briefing. Ruffin v. Dugger, No. 86-3485, 848 F.2d 1512 (11th Cir. interim order rendered May 4, 1987)

DATE: August 11, 1987

EVENT: Mr. Ruffin files a Motion for supplemental briefing concerning recent Eleventh Circuit cases; and, he designated the "harmless error" aspect of Hitchcock v. Dugger, as set out in Elledge v. Dugger, 823 F.2d 1439, 1448-49 (11th Cir. 1987) for additional supplemental briefing.

DATE: August 17, 1987

EVENT: The custodian filed an opposition to additional supplemental briefing on two grounds: (1) Judge Hatchett's Order was law of the case; and, (2) that the panel was aware of all cases relying on Hitchcock. The custodian pointed out that Mr. Ruffin's pending 9-page motion was the functional equivalent of a brief. The motion traveled with the case and was never ruled on.

DATE: July 20, 1987 through June 13, 1988

EVENT: Notices of Supplemental Authority filed by both Mr. Ruffin and the custodian:

(a) Notice filed July 30, 1987 Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987) decided July 28, 1987.

(b) Notice filed July 22, 1987 Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987) decided July 22, 1987.

(c) Notice filed September 4, 1987 Riley v. Wainwright, 517 So.2d 656 (Fla. 1987) decided September 4, 1987.

(d) Notice filed September 14, 1987 Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) decided September 9, 1987.

(e) Notice filed September 14, 1987 Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) decided September 9, 1987.

(f) Notice filed November 3, 1987 Lightbourne v. Dugger, 829 F.2d 1012 (11th Cir. 1987) decided September 18, 1987.

(g) Notice filed November 10, 1987 Demps v. Dugger, 514 So.2d 1092 (Fla. 1987) decided October 3, 1987.

(h) Notice filed December 28, 1987 Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) decided November 13, 1987.

(i) Notice filed December 28, 1987 Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987) decided December 15, 1987.

(j) Notice filed February 26, 1988 Combs v. State, 525 So.2d 853 (Fla. 1988) decided February 18, 1988.

(k) Notice filed March 10, 1988 Daughtery v. Dugger, 839 F.2d 1426 (11th Cir. 1988) decided February 12, 1988.

(l) Notice filed May 13, 1988 Hall v. Dugger, 13 F.L.W. 320, 1988 WestLaw 47674 (Fla. No. 71,284) decided May 13, 1988.

(m) Notice filed June 13, 1988 Maynard v. Cartwright, 56 U.S. L.W. 4501, 99 L.Ed.2d 47, 108 S.Ct. 1267 decided June 6, 1988.

DATE: June 20, 1988

EVENT: The panel decision in Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) is rendered. Judge Tjoflat concurred in part and dissented in part as the panel failed to consider the possibility that the Lockett error may have had no prejudicial effect on sentencing. Alternatively, Judge Tjoflat wrote that the panel should address the harmless error issue or remand the issue to the district court.

DATE: July 8, 1988

EVENT: The custodian filed a suggestion for rehearing en banc so that the harmless issue might be considered.

DATE: August 18, 1988

EVENT: An order is rendered denying the suggestion for rehearing en banc.

DATE: August 24, 1988

EVENT: The custodian files a motion to stay mandate pending application to this Court for a Writ of Certiorari.

DATE: September 1, 1988

EVENT: An order is rendered staying the mandate until October 3, 1988.

Incredibly, the panel has declined to address the "harmless error" aspect of

Hitchcock prior to remanding the case to the district court with instructions that The Great Writ issue.

REASONS FOR GRANTING THE WRIT

In the case at bar, Judge Hatchett rendered an interim order on May 4, 1987, barring further briefing in this litigation. Neither Mr. ruffin nor the custodian, in light of this order, were able to address "harmless error" in respect to the Lockett/Hitchcock claim.

There exists conflict between the Ruffin decision and other Eleventh Circuit opinions and Florida Supreme Court opinions which address "harmless error" prior to rendering a decision granting a new sentencing hearing. The highest state court in Florida cannot grant such relief without first considering harmless error. Section 59.041, Florida Statutes (1987) provides:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading

> or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

Section 924.33, Florida Statutes (1987) provides:

> No judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant.

Mr. Ruffin's accomplice, Freddie Lee Hall, has raised this same claim in an original action for habeas corpus relief in the Supreme Court of Florida. That court has inherently applied the Florida statutory law to the Hitchcock claim and rejected it under the "harmless error" doctrine. Hall v. Dugger, 13 F.L.W. 320, 1988 WestLaw 47674, (Fla. No. 71,284,

decided May 13, 1988).[1] Although supplemental briefing was barred, the panel below was furnished with this authority prior to rendition of its opinion. The custodian can only surmise that since the Freddie Lee Hall opinion and the "harmless error" decision in Clark v. Dugger, 834 F.2d 1561, 1568-69 (11th Cir. 1987) were both furnished, then the panel declined to follow 28 U.S.C. §2111 and 28 U.S.C., Fed. Rules Civ. P. Rule 61 as

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1/ Numerous decisions of the Florida Supreme Court now focus on the "harmless error" aspect of Hitchcock. Jackson v. Dugger, 13 F.L.W. 392, 1988 WestLaw 31394 (Fla. No. 71,960 decided June 16, 1988); Smith v. Dugger, 13 F.L.W. 390, 1988 WestLaw 61396 (Fla. No. 71,367 decided June 16, 1988); White v. Dugger, 523 So.2d 140 (Fla. 1988) as modified on rehearing denied April 13, 1988; Ford v. State, 522 So.2d 345 (Fla. 1988); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987); and, Delap v. Dugger, 513 So.2d 659 (Fla. 1987).

permitted by 28 U.S.C. §2254, Rule 11.[2] There is no question but that Judge Tjoflat in his dissent was correct in light of the Congressional mandate as codified in 28 U.S.C. §2111. Judge Tjoflat writes:

> . . . Petitioner is not entitled to a new sentencing hearing if the Lockett error was harmless beyond a reasonable doubt. Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). The court, however, fails to consider the possibility that the Lockett error may have had no prejudicial effect on petitioner's sentencing proceeding. We should address the harmless error issue or remand the issue to the district court. Because the parties neither briefed the issue nor alluded to it in oral argument to this panel, I would remand the question of the

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2/ On September 8, 1988, the Supreme Court of Florida adopted the Eleventh Circuit's harmless error analysis of the Lockett/Hitchcock claim considered in Clark v. Dugger, 834 F.2d 1561, 1568-69 (11th Cir. 1987) in the same case Clark v. State, 1988 WestLaw 91788, 13 F.L.W. 548, (Fla. No. 72,303, decided Sept. 8, 1988).

prejudice caused by the Lockett error to the district court.

Text of 848 F.2d at 1519-20.

The Court of Appeals declined to apply a harmless error analysis to Judge Moore's district court decision rejecting the Lockett claim in light of Hitchcock; 28 U.S.C. §2111; and, 28 U.S.C., Fed. Rules Civ.Proc., Rule 61 as permitted by 28 U.S.C. §2254, Rule 11. Further, as a matter of comity to the State of Florida, in light of §§59.041 and 924.33, Florida Statutes (1987), the court below should have considered "harmless error" prior to granting a new sentencing proceeding; and, if comity were appropriately ignored, then under 28 U.S.C. §2111 and 28 U.S.C., Fed. Rules Civ.Proc., Rule 61 as permitted by 28 U.S.C. §2254, Rule 11 and the spirit of 18 U.S.C., Fed. Rules Crim.Proc., Rule 52(a) mandates automatic consideration of "harmless error" in analysis of Judge Moore's decision rejecting the Lockett claim prior to granting relief.

Judge Moore, in the United States District Court, has complied with both 28 U.S.C. §2111 and, 28 U.S.C., Fed. Rules Civ.Proc., Rule 61 in his obligatory conclusion inferring the substantial rights of Mr. Ruffin had not been violated in his presentation of non-statutory mitigating circumstances during the sentencing phase of his trial; otherwise, why would Judge Moore opine: "Petitioner was allowed to introduce evidence of non-statutory mitigating circumstances during the sentencing phase of his trial, and nothing in the record supports the contention that this evidence was not considered by the advisory jury." (A-3) Judge Moore found the state court record proper to contain sufficient information and/or conclusive evidence as support for his harmless error reasoning in his district court collateral review. Thereafter, only Judge Tjoflat, on Judge

Moore's reviewing panel, recognizes "... the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations...". United States v. Harrington, 461 U.S. 499, 76 L.Ed.2d 96 at 106, 107 S.Ct. 1974 (1983). (A-40). Thus, it is of small moment that Judge Hatchett barred supplemental briefing; that the lead briefs did not discuss "harmless error"; and, that oral argument focused on Enmund rather than the "harmless error" aspect of the then undecided Hitchcock case.

Both the Florida and federal courts are mandated by their legislatures to consider the harmless error doctrine prior to granting relief. The decision below creates much tension in the Florida courts and federal courts which rely on harmless error. This Court has construed and applied the federal harmless error statute

in McDonough Power Equipment v. Greenwood, 464 U.S. 548, 78 L.Ed.2d 663, 670, 104 S.Ct. 845 (1984). The ruling of the Court of Appeals in this case must be assessed against the above authority; and, it is there where the court below failed to consider whether the essential fairness of the sentencing procedure had been affected. Below, there was an automatic reversal on the Hitchcock claim; and, that decision ignores the harmless-error statute, 28 U.S.C. §2111 which applies directly to appellate courts. Id.

Neither direct nor capital collateral litigation goes away. The court below in granting automatic reversal on the Hitchcock claim [without even consideration of harmless error] sub silencio suggests that death row litigants are entitled to perfect trials rather than fair ones. There is neither the economic nor professional resources for Florida to provde perfect

trials in its prosecutions. The state courts recognize this with the state harmless-error statutes; and, the state contemporaneous objection rule which serves as the basis for the procedural default rule. This same reality is addressed by the federal harmless-error statute; but, ignored below.

On federal questions focusing on "harmless error" the Florida courts follow the state harmless error statute and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Below, the Court of Appeals failed to consider its automatic federal harmless error directives. 28 U.S.C. §2111 There is certainly a conflict in the approaches the Florida courts and the district courts took to appellate review; and, that taken by the court below. The People of Florida and of this nation are most concerned with capital litigation. Over 36 states, according

to Death Row USA published by the NAACP Legal Defense Fund, have death penalty statutes. All of these convictions are subject to 28 U.S.C. §2254 review. In light of 28 U.S.C. §2111, must a federal district court and court of appeals consider "harmless error" prior to granting habeas corpus relief? This is no insignificant question. The federal court calendars are clogged with capital and non-capital habeas corpus review. Has not Congress intended that 28 U.S.C. §2111 and 28 U.S.C., Fed. Rules Civ. P., Rule 61 as permitted by 28 U.S.C. §2254, Rule 11 be considered before granting relief? This case involves the construction and application of the federal harmless error statute to both state and federal collateral litigations. 28 U.S.C. §§2254 & 2255. The decision below is a subtle erosion of the legal principles embraced in the harmless error doctrine.

The custodian invites this Court to enter summary reversal on this case. The law on harmless error is stable and well settled. The facts are not in dispute; and, Judge Tjoflat's dissent establishes the decision below is in error. With this in mind, the custodian now calls on Mr. Ruffin to address whether the Court of Appeals erred in failing to consider harmless error prior to vacating the death penalty on a Lockett/Hitchcock violation. See, United States v. Hastings, 461 U.S. 499, 76 L.Ed.2d 96, 103 fn.3, 103 S.Ct. 1974 (1983). There is no basis to disuade this Court from reversing on a summary disposition. To allow this Court of Appeals' decision to stand will have a grim national impact as inferior federal courts will feel free to ignore the federal harmless error statute and automatically grant The Great Writ in capital habeas corpus litigation.

CONCLUSION

Mr. Ruffin's custodian asks this Court to grant its most gracious Writ of Certiorari and to further consider summary reversal of the decision below with instructions that the Court of Appeals consider and apply 28 U.S.C. §2111 and Chapman v. California prior to automatically vacating a death sentence for a Lockett/Hitchcock violation.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

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v.

MACK RUFFIN, JR.,

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PETITION FOR CERTIORARI TO THE SUPREME COURT OF FLORIDA

APPENDIX OF PETITIONER

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(1) Ruffin v. Wainwright, No. 82-00196-Civ-Oc-16, slip op. pages 15 through 16 (M.D. Fla. May 21, 1986).

(2) Order of Judge Hatchett denying Appellant's motion for leave to file supplemental reply brief Ruffin v. Dugger, No. 86-3485, 848 F.2d 1512 (11th Cir. interim order rendered May 4, 1987).

(3) Motion for leave to file supplemental brief concerning recent eleventh circuit cases for Petitioner-Appellant, Ruffin v. Dugger, No. 86-3485, pages 1 through 3, 848 F.2d 1512 (11th Cir. filed August 11, 1987).

(4) Motion in opposition to petitioner's motion for leave to file supplemental brief for Respondents, Ruffin v. Dugger, No. 86-3485, 848 F.2d 1512 (11th Cir. filed August 17, 1987).

(5) Ruffin v. Dugger, No. 86-3485, 848 F.2d 1512 (11th Cir. June 20, 1988).

(6) Suggestion for rehearing en banc for Respondents, Ruffin v. Dugger, No. 86-3485, (11th Cir. filed July 8, 1988).

(7) Motion to stay mandate for Respondents, Ruffin v. Dugger, No. 86-3485, 848 F.2d 1512 (11th Cir. filed August 24, 1988).

(8) Excerpts from record proper on direct appeal, Ruffin v. State, No. 55,684, 397 So.2d 277 (Fla. 1981).

(a) Excerpts from 2nd phase or penalty phase [advisory sentence] (R 1351-1352; 1358-1359; 1365-1367; 1374-1382; 1383-1384; 1398 [3 ¶'s]; 1404-1405; 1407-1414).

(b) Excerpts from written findings of fact (R 346-347).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

MACK RUFFIN, JR.,

Petitioner,

vs. No. 82-196-Civ-Oc-16

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,

Respondents.

ORDER AND OPINION

* * *

3. The trial court improperly restricted the jury's consideration to the statutorily enumerated mitigating circumstances.

Limitations on the mitigating circumstances which can be considered in deciding whether to impose the death penalty are unconstitutional. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982), the

Fifth Circuit condemned a jury charge which could have led a reasonable juror to believe that only two mitigating factors could be considered. Petitioner argues that the instructions in the instant case are sufficiently similar to compel a like holding. However, in Washington, the trial judge read only two of the statutory factors to the jury, thereby strongly suggesting that only these two factors could be considered. In the instant case, the Court read the entire list of statutory mitigating circumstances to the advisory jury and did not affirmatively suggest that this list was exhaustive.

The absence of an explicit instruction that non-statutory mitigating factors can be considered and the use of similar language in presenting aggravating and mitigating factors do not compel the conclusion that the jury was precluded from considering non-statutory mitigating circumstances. See Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985); Alvord v. Wain-

wright, 725 F.2d 1282 (11th Cir.), cert. denied, 105 S.Ct. 355 (1984); Ford v. Strickland, 696 F.2d 804 (11th Cir.), cert. denied, 464 U.S. 865 (1983). Petitioner was allowed to introduce evidence of non-statutory mitigating circumstances during the sentencing phase of his trial, and nothing in the record supports the contention that this evidence was not considered by the advisory jury. See Funchess v. Wainwright, supra; Alvord v. Wainwright, supra; Ford v. Strickland, supra. But cf. Washington v. Watkins, supra.

* * *

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3485

MACK RUFFIN, JR.,

Petitioner-Appellant-
Cross-Appellee,

versus

RICHARD L. DUGGER,
Secretary, Florida Department of Offender Rehabilitation, and
TOM BARTON,
Superintendent, Florida State Prison at Starke, Florida,

Respondents-Appellees-
Cross-appellants.

- -

On Appeal from the United States
District Court for the
Middle District of Florida

- -

O R D E R:

Appellant's motion for leave to file supplemental reply brief concerning recent United States Supreme Court decisions is DENIED.

/s/ JOSEPH W. HATCHETT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MACK RUFFIN, JR.,	)	
	)	
Petitioner-Appellant,	)	
Cross-Appellee,	)	
	)	
v.	)	CASE NO. 86-3485
	)	
LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,	)	
	)	
Respondents-Appellees,	)	
Cross-Appellants,	)	
- - - - - - - - - - - - -	)	

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF CONCERNING RECENT ELEVENTH CIRCUIT CASES

Petitioner-Appellant Mack Ruffin, Jr. ("Ruffin"), by his undersigned counsel, requests that the Court enter an order permitting him to file a supplemental brief concerning this Court's decisions in Elledge v. Dugger, No. 86-5120 (11th Cir. July 20, 1987) and Magill v. Dugger, No. 85-3820 (11th Cir. July 28, 1987). In support of his request Mr. Ruffin sets forth the following:

1. One of the claims raised on Mr. Ruffin's appeal is that his death sentence is unconstitutional because, in violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) -- and now Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) -- sentencing consideration of mitigating circumstance at Mr. Ruffin's trial was restricted to the circumstances listed in the Florida statute. See Point II E in Brief of Appellant, pp. 41-44, and in Appellant's Reply Brief, pp. 18-22.

2. Another claim raised on this appeal is that Mr. Ruffin is entitled to relief from his death sentence because trial counsel were ineffective at the penalty phase of his trial in that, inter alia (i) the only evidence trial counsel introduced in mitigation was the sanity report of Dr. Barnard, a state-appointed psychiatrist, which contained inaccurate, unfavorable information about Mr. Ruffin and (ii) trial counsel failed to investigate and

develop the Eddings-type information revealed in that report and to introduce available testimony that Ruffin was not a criminal type and that his participation in criminal activity was explained by retarded development, including susceptibility to domination by Freddie Lee Hall. See, Point VIII in Brief of Appellant, pp. 59-61, and in Appellant's Reply Brief, pp. 34-37. See also, Appellant's Supplemental Reply Brief, p.15.

Lockett/Hitchcock

3. In Hitchcock v. Dugger, the United States Supreme Court granted the defendant relief from a death sentence on the ground that his jury was restricted in the consideration of non-statutory mitigating circumstances by the standard Florida jury instructions given in that case -- the same as the instructions given to Mr. Ruffin's jury. Mr. Ruffin has previously sought leave to submit a supplemental brief showing that Hitchcock requires a new sentencing here; leave was denied by

an order of the Court filed on May 4, 1987.

4. This Court has recently rendered two apparently conflicting decisions concerning the applicability of Hitchcock:

(a) In Elledge v. Dugger, an Eleventh Circuit panel stated that, because Florida juries are merely advisory, jury instructions, such as those found faulty in Hitchcock, can be harmless if there is no affirmative indication in the record that the judge held a like erroneous view of the law when he participated in passing sentence. Thus, in Elledge, the Court rejected the petitioner's Hitchcock/Lockett claim. Mr. Elledge has petitioned the Court for a re-hearing on this issue for some of the reasons that, by this motion, Mr. Ruffin seeks leave to brief.

(b) In Magill v. Dugger, a different Eleventh Circuit panel held

that, regardless of the trial judge's beliefs, when the instructions lead the jury to believe that it is restricted in its sentencing deliberations to statutory mitigating circumstances, the Constitution is violated and the defendant is entitled to relief.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MACK RUFFIN, JR.,	
Petitioner-Appellant, Cross-Appellee,	
v.	CASE NO. 86-3485
LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,	
Respondents-Appellees, Cross-Appellants,	

RESPONDENT'S MOTION IN OPPOSITION
TO PETITIONER'S MOTION FOR LEAVE
TO FILE SUPPLEMENTAL BRIEF

COMES NOW the custodian, by and through the undersigned Assistant Attorney General, who files this Response in Opposition to supplemental briefing and as grounds therefor would aver:

I.

On May 4, 1987, Judge Hatchett entered an order denying Petitioner's request for supplemental briefing. That Order now serves as law of the case.

II.

Counsel for the custodian would pause to point out that Petitioner has submitted a most competent and inclusive nine page motion which serves a the functional equivalent of a supplemental brief. The Hitchcock claim is one that this Court has not ignored; and, at this junctu·e, there is little that supplemental briefing on this case would accomplish in light of the internal Eleventh Circuit decisions now being filed.

WHEREFORE, counsel for the custodian prays that this Honorable Court make and enter an Order denying further supplemental briefing.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

/s/ William I. Munsey, Jr.
WILLIAM I. MUNSEY, JR.
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COUNSEL FOR THE RESPONDENT

CERTIFICATE OF SERIVCE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to NAOMI G. LITVIN, ESQUIRE and ASA D. SOKOLOW, ESQUIRE, Rosenman & Colin, 575 Madison Avenue, New York, New York 10022 and MARC T. TAPS, ESQUIRE, 822 N. Monroe Street, Tallahassee, Florida 32303 on this 18th day of August, 1987.

/s/ William I. Munsey, Jr.
Of Counsel for Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

- - - - - - - - - - - - - -

No. 86-3485

- - - - - - - - - - - - - -

MACK RUFFIN, JR.,

Petitioner-Appellant-
Cross-Appellee,

versus

RICHARD L. DUGGER, Secretary,
Florida Department of Offender
Rehabilitation, and
TOM BARTON, Superintendent,
Florida State Prison at Starke,
Florida,

Respondents-Appellees-
Cross-Appellants.

- - - - - - - - - - - - - - - -

Appeals from the United States District
Court for the Middle District
of Florida

- - - - - - - - - - - - - - - -

(June 20, 1988)

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

Petitioner, Mack Ruffin, Jr., is a Florida death row inmate, having been convicted and sentenced to death for premeditated murder. Petitioner is also serving a thirty-year prison sentence for sexual assault, a crime associated with the murder. He seeks a writ of habeas corpus setting aside both of his convictions and his death sentence. The district court refused to issue the writ, concluding that none of petitioner's claims disclosed federal constitutional error. We affirm the district court's refusal to set aside petitioner's convictions, but find that petitioner's death sentence is the product of an unconstitutional jury instruction.

I.

Petitioner was convicted of sexually assaulting and murdering Karol Hurst on the afternoon of February 21, 1978, near Webster, Florida. According to two confessions petitioner gave to the police after his arrest[1] and the other evidence

the State presented at trial, the following took place that day. Petitioner and an accomplice, Freddie Lee Hall, decided to rob a Shop-And-Go convenience store in Ridge Manor, Florida, and needed a getaway car. To obtain one, they went, in petitioner's automobile, to a Pantry Pride grocery store parking lot in Leesburg, Florida. On arrival, they saw Mrs. Hurst, who was seven months pregnant, carrying some groceries to her car. Petitioner and Hall, each armed with a pistol, confronted Mrs. Hurst, and Hall forced her into her car. Hall got into the car with her and drove several miles to a secluded wooded area near Webster; petitioner followed in his car. Petitioner and Hall then raped Mrs. Hurst in the back seat of the car. When they finished, they ordered her out of the car. Hall wanted to kill Mrs. Hurst so that she could not identify them, but petitioner suggested that they simply leave her, bound and gagged, in the woods. Mrs. Hurst begged them to spare

her life and wrote them a check for $20,000, payable to "John Doe." Petitioner refused to accept the check; whereupon, Hall pistol-whipped Mrs. Hurst and, while she was lying face down on the ground, shot her in the back of the head.

That evening, petitioner and Hall drove Mrs. Hurst's car to the Shop-And-Go store they had planned to rob and entered the store. The store was crowded, so they loitered for twenty minutes in the rear aisle, waiting for some of the customers to leave. The store manager noticed them, became suspicious, and called the sheriff. Meanwhile, petitioner and Hall decided that the store was too crowded and they left, intending to return later in the evening. As they exited the store, they encountered Deputy Sheriff Lonnie Coburn, armed with a shotgun, who was responding to the manager's call. Coburn ordered petitioner and Hall to assume a "spread eagle" position against his patrol car and began to frisk them for weapons.

While Coburn was frisking Hall, Hall attacked him. During the sturggle that ensued, Hall grabbed Coburn's service revolver and knocked Coburn to the ground. Hall then shot Coburn to death.

Petitioner and Hall fled the scene in Mrs. Hurst's car, pursued by another deputy sheriff. During the chase, petitioner shot at the pursuing deputy with Coburn's revolver. Petitioner and Hall eventually abandoned Mrs. Hurst's automobile in an orange grove and fled on foot. A few hours later, the police apprehended them.

Petitioner was indicted and tried for the sexual assault and premeditated murder of Mrs. Hurst.[2] At trial, the State established the facts we have recited. Petitioner put on no defense. With respect to the murder charge, his attorney's sole argument to the jury was that the State had not proved beyond a reasonable doubt that petitioner intended Mrs. Hurst's death.[3]

The jury found petitioner guilty as charged. During the sentencing phase of the trial, conducted after the jury convicted petitioner of murder, petitioner's attorney introduced as mitigating evidence the report of a psychiatric examination conducted for the purpose of determining petitioner's competence to stand trial. Drawing on various pieces of mitigating evidence contained in that report, petitioner's lack of an adult criminal record, Hall's alleged domination of petitioner, and the fact that Hall insisted on disposing of the victim to prevent her from becoming a witness, counsel, in his closing argument, urged the jury to recommend a life sentence. The jury recommended the death penalty, however, and the court followed the jury's recommendation, sentencing petitioner to death.

Petitioner appealed his convictions and sentences to the Supreme Court of Florida, which affirmed. Ruffin v. State, 397 So.2d 277 (Fla. 1981). Petitioner's

application to the Supreme Court of the United States for a writ of certiorari was denied. Ruffin v. Florida, 454 U.S. 882, 102 S.Ct. 368 (1981).

After exhausting his state remedies,[4] petitioner brought this action in the district court for habeas corpus relief, challenging the validity of his convictions and his death sentence on the nine grounds enumerated in the margin.[5] The district court summarily rejected each ground, concluding that the record of petitioner's state court trial and collateral review proceedings demonstrated as a matter of law that petitioner was not entitled to relief.

Petitioner now appeals. He contends that he has made out a case for habeas relief on each of the grounds asserted in his petition to the district court and asks us to remand the case to the district court for an evidentiary hearing.

We find no constitutional infirmity in petitioner's convictions, and reject

without discussion the errors petitioner assigns to them. With respect to petitioner's death sentence, two claimed errors are worthy of discussion; one of them, as we noted at the outset, requires us to remand the case to the district court for further proceedings.

II.

Petitioner contends that the eighth and fourteenth amendments precluded the court from imposing capital punishment because the jury made no finding that he intended Mrs. Hurst's death. It is true that a defendant cannot be sentenced to death unless he intended the victim's death, see Enmund v. Florida, 458 U.S. 782, 801, 102 S.Ct. 3368, 3378-79 (1982), or unless he displayed "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Tison v. Arizona, ___ U.S. ___, ___, 107 S.Ct. 1676, 1688 (1987). In this case, however, the jury, in finding petitioner guilty of pre-

meditated murder, necessarily concluded that petitioner intended Mrs. Hurst's death. An examination of the court's charge to the jury at the conclusion of the guilt phase of petitioner's trial makes this point clear.

At the conclusion of the guilt phase of the trial, the court instructed the jury as follows:

> THE COURT: Ladies and gentlemen of the jury, you have listened carefully to the evidence and the arguments of the attorneys. I now ask you to give the same careful attention to the law as determined by the Court which you must apply to the facts as you find them from the evidence. You, alone, as jurors sworn to try this case, must pass on the issues of fact, and your verdict must be based solely on the evidence or lack of evidence, and the law as it is given to you by the Court.
>
> The defendant, C. Mack Ruffin, Jr., together with another not on trial at this time, is charged with the crime of first-degree murder and also the crime of sexual battery against Karol Lea Hurst, in that on February 21, 1978, in Sumter County, Florida, he did unlawfully, from a premeditated design to effect the death of Karol Lea

Hurst, a human being, or any human being, kill and murder the said Karol Lea Hurst by shooting her with a pistol, a further and more particular description being to this Body unknown, in violation of Florida Statute 782.04.

[The court then instructed the jury on the lesser included offenses, e.g., second-degree murder.]

. . . .

The defendant has entered his pleas of not guilty. The effect of these pleas is to require the State to prove each material allegation of the indictments beyond and to the exclusion of every reasonable doubt before the defendant may be found guilty.

A person may commit a crime by his own personal act, or through the act or acts of another person. Any person who knowingly aids, abets, counsels, hires, or otherwise procures the commission of a crime, is equally guilty with the one who actually performs the criminal act, whether he is or is not present at the commission of the offense. However, for one person to be guilty of a crime physically committed by another, it is necessary that he have a conscious intent that the criminal act shall be done, and that pursuant to that intent he do some act or say some word which was intended to and which did incite, encourage, assist, induce, or cause another person to actually commit the crime.

. . . .

[M]urder in the first degree[] is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being.

A premeditated design to kill is a fully-formed conscious purpose to take human life, formed upon reflection and present in the mind at the time of the killing. The law does not fix the exact period of time which must pass between the formation of the intent to kill and the carrying out of the intent. It may be only a short time and yet make the killing premeditated, if the fixed intent to kill was formed long enough before the actual killing to permit of some reflection on the part of the person performing it, and that person was at the time of carrying out that intent fully conscious of a settled and fixed purpose to kill and of the results which would follow such killing. When such state of mind exists there is a premeditated design to kill, although the killing follows closely upon the formation of the intent.

. . . .

The punishment provided by law for murder in the first degree is life imprisonment, or death, as may be determined by the Court at a later proceeding.

Murder in the second degree is the killing of a human being

by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without a premeditated design to effect the death of any particular individual.

. . . .

If the defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree.

If the killing was not from a premeditated design to effect the death of any human being but was in the perpetration of an act imminently dangerous to another evincing a depraved mind regardless of human life, the defendant should be found guilty of murder in the second degree.

(Emphasis added.)

This instruction clearly explained to the jury that to find petitioner guilty of murder, it had to conclude beyond a reasonable doubt that he acted with a premeditated design to cause death. Thus, when the jury found petitioner guilty of murder, it necessarily determined as a fact that petitioner killed with premeditation; in other words, the jury found that he in-

tended the victim's death. See Raulerson v. Wainwright, 753 F.2d 869, 876 (11th Cir. 1985) (per curiam) ("Jurors are presumed to follow the law as they are instructed.").

Judge Hatchett, in his dissent, disagrees with this analysis of petitioner's Enmund claim in three respects.[6] First, he argues that Enmund and its progeny require an express finding that the defendant intended the victim's death. See post at ___. We find no such requirement in the case law. Logic suggests that the finding of intent implicit in a verdict of premeditated murder should suffice.

Assuming that an implicit finding is sufficient, Judge Hatchett argues that the verdict in this case contains no such finding. See post at ___. We reject this argument out of hand. As discussed above, the court's charge instructed the jury that it could not find petitioner guilty of murder unless it found premeditation on his part. The jury's conclusion that pe-

titioner acted with premeditation thus satisfied Enmund.

Judge Hatchett's third point of disagreement with our analysis is that the finding that the defendant intended the victim's death must be made at some time following the guilt phase of the defendant's trial. See post at ___. Accordingly, under Florida's death penalty model, the finding must be made by the jury at the conclusion of the sentencing phase of the defendant's trial, by the trial judge when he imposes the death sentence, or by the state supreme court when it reviews the sentence on direct appeal.

We submit that the Enmund determination need not be made after the guilt phase of the defendant's trial has concluded. Enmund does not dictate when the state must make the requisite finding of intent, who must make it, or how it must be made. "The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under

Enmund for such punishment." Cabana v. Bullock, 474 U.S. 376, 386, 106 S.Ct. 689, 697 (1986). We have previously held that a conviction for a degree of murder that requires, as an element of the crime, an intent to kill necessarily establishes the degree of culpability Enmund requires. See e.g., Johnson v. Kemp, 759 F.2d 1503, 1507 (11th Cir. 1985) (conviction of malice murder disposes of Enmund claim); Hall v. Wainwright, 733 F.2d 766, 771-72 (11th Cir. 1984) (per curiam) (distinguishing Enmund on the ground that jury instruction in Hall required finding of premeditation in order to convict defendant), cert. denied, 471 U.S. 1107, 105 S.Ct. 2344 (1985); see also Fleming v. Kemp, 748 F.2d 1435, 1452-54 (11th Cir. 1984) (Enmund requirement satisfied when jury instruction, viewed as a whole, mandated a finding of malice aforethought, despite judge's erroneous instruction on felony-murder), cert. denied, 475 U.S. 1058, 106 S.Ct. 1286 (1986). Thus, when

the jury found petitioner guilty of premeditated murder, the Enmund rule was satisfied.[7]

III.

Petitioner contends that his death sentence should be set aside because the trial judge, in charging the jury as to its sentencing options, to wit, the death penalty or imprisonment for life, precluded the jury from considering evidence before the jury which, petitioner contends, may have prompted it to recommend a life sentence. The eighth and fourteenth amendments require that the sentencer in a capital case[8] consider any evidence which mitigates against the imposition of the death penalty. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978) (plurality).

In charging the jury in petitioner's case, the trial judge allegedly violated Lockett's command because he suggested that the only mitigating factors the jury could consider were those enumerated in the Florida death penalty statute, Fla.

Stat. § 921.141 (1987). The court instructed the jury with respect to mitigating factors as follows:

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these . . .

(Emphasis added.) The court then read to the jury the seven statutory mitigating factors set forth in section 921.141; it did not, however, instruct the jury that it could consider any other mitigating evidence present in the record.

The district court found no violation of the Lockett rule because the trial judge "read the entire list of statutorily mitigating circumstances to the advisory jury and did not affirmatively suggest that this list was exhaustive." That the trial judge did not state that the statutory list was exhaustive, however, did not

save the instruction. Hitchcock v. Dugger, __ U.S. __, 107 S.Ct. 1821 (1987), decided after the district court denied the writ, holds that the Lockett rule is violated where, as here, the jury is not instructed to consider nonstatutory mitigating factors as well as the mitigating factors enumerated in the statute. Id. at __, 107 S.Ct. at 1824.

The instruction in this case advised the jury that the only mitigating factors it could consider were those set forth in the statute. The instruction is virtually indistinguishable from the instruction the Supreme Court condemned in Hitchcock,[9] and the instruction we condemned in Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987) (en banc).[10] Given this precedent, we must conclude that the trial court committed constitutional error in charging the jury at the conclusion of the sentencing phase of petitioner's trial. We therefore remand petitioner's Lockett claim to the district court with instructions to enter

an order granting the application for a writ of habeas corpus, unless the State within a reasonable period of time either resentences petitioner in a proceeding that comports with the requirements of Lockett or vacates the death sentence and imposes a lesser sentence consistent with law. See Hitchcock, 107 S.Ct. at 1824-25; Hargrave, 832 F.2d at 1535.

AFFIRMED in part, VACATED in part, and REMANDED with instructions.

---

1. At petitioner's trial, the State introduced two confessions into evidence. Petitioner gave the first confession immediately after his arrest, before he led the police to the victim's body; he gave the second confession, which was tape recorded, the following day. Prior to trial, petitioner moved to suppress these confessions, and the court denied his motion. He did not challenge this ruling on appeal. Petitioner sought to relitigate his motion to suppress in a Fla. R. Crim. P. 3.850 motion to the state trial court, see infra note 4, but the court refused to entertain the motion because its subject matter is cognizable only on direct appeal. The district court, in the proceeding below, refused to review the merits of petitioner's motion to suppress because his failure to raise the matter on direct appeal precluded the Supreme Court of Florida from passing on them. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977). The district court's ruling was correct; accordingly, we do not review the merits of petitioner's challenge to his confessions.

2. Petitioner was also charged with the kidnapping, grand larceny, and robbery of Mrs. Hurst. These charges were dismissed on the State's motion prior to trial.

Hall was also indicted for the murder of Mrs. Hurst. He was tried separately, convicted, and received a sentence of death. See Hall v. State, 403 So.2d 1321 (Fla. 1981).

In another indictment, petitioner and Hall were charged with the murder of Coburn. They were tried jointly on this charge. Both were convicted and sentenced to prison for life. See Hall v. State, 403 So.2d 1319 (Fla. 1981) (per curiam).

3. With respect to the charge of sexual assault, counsel argued that the State had not proved beyond a reasonable doubt that petitioner had actually raped the victim.

4. After the United States Supreme Court denied petitioner's application for a writ of certiorari in 1981, petitioner moved the state trial court, pursuant to Fla. R. Crim. P. 3.850, to set aside his convictions for murder and sexual assault and his death sentence. The court denied his motion without an evidentiary hearing. The Supreme Court of Florida affirmed. Ruffin v. State, 420 So.2d 591 (Fla. 1982) (per curiam). Petitioner then brought this habeas corpus action in the district court. Because some of the claims in his petition had not been exhausted, the district court stayed further proceedings in the case to permit petitioner to repair to state court. Petitioner then applied to the Florida Supreme Court for a writ of habeas corpus, without success. See Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984). Petitioner thereafter returned to the district court to litigate his habeas petition.

5. Petitioner claimed that his convictions for murder and sexual assault are invalid because (1) the ground jury that indicted him did not contain a fair cross section of the community as required by the sixth and fourteenth amendments, (2) the prosecutor intentionally excluded blacks from his petit jury through the exercise of peremptory challenges in violation of the fourteenth amendment's equal protection clause, (3) his convictions were the product of illegal confessions in violation of the fourteenth amendment's due process clause, and (4) the evidence was insufficient to established [sic] the crimes of which he was convicted again in violation of the due process clause.

Petitioner challenged the validity of both the guilt and sentencing phases of his trial on the ground that they were (5) fundamentally unfair in violation of the due process clause, and (6) the product of ineffective assistance of counsel in violation of the sixth and fourteenth amendments. Petitioner challenged his death sentence on the additional grounds that (7) the jury failed to find that he intended the victim's death as required by the eighth and fourteenth amendments, (8) the trial judge, in charging the jury on its sentencing recommendation, precluded the jury from considering certain mitigating evidence, contrary to the eighth and fourteenth amendments, and (9) the Florida death penalty scheme is applied in a racially discriminatory fashion in violation of the fourteenth amendment's equal protection clause.

6. It should be noted that Judge Hatchett concurs in our view that the State presented sufficient evidence to convict petitioner of premeditated murder. He therefore agrees that a reasonable jury could conclude that petitioner intended Mrs. Hurst's death.

7. Although the trial jury, in convicting petitioner of premeditated murder, necessarily found that petitioner intended Mrs. Hurst's death, the recent decision in Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676 (1987), provides alternative support for denying petitioner's Enmund claim. Under Tison, a state may impose a death sentence on a defendant who has acted with reckless disregard for human life. Id. at ___, 107 S.Ct. at 1688.

This standard is clearly met in this case. In petitioner's first Rule 3.850 proceeding, the state trial court considered his Enmund claim, notwithstanding the claim's cognizability on direct appeal

as opposed to collateral review. The trial court entertained the claim on the merits because, the court concluded, the claim was based on a legal principle not recognized at the time petitioner prosecuted his direct appeal. In rejecting his Enmund claim, the trial court observed:

> Ruffin was present, he assisted codefendant Hall in the kidnapping of Karol Hurst, raped her along with his partner, knew that Hall was going to kill her and made no effort to interfere with the killing and then continued on the joint venture, utilizing Mrs. Hurst's vehicle to drive to the convenience store (the site of an intended robbery) where Deputy Coburn was murdered and Ruffin continued his partnership with Hall by firing a gun at pursuing Deputy Janes.
>
> The evidence is abundantly clear and sufficient to demonstrate Ruffin's joint participation in the premeditated murder of Karol Hurst . . . .

See Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982) (per curiam) (quoting trial court's dispositive order). This statement, which is presumptively correct, see Cabana v. Bullock, 474 U.S. 376, 388, 106 S.Ct. 689, 697-98 (1986); see also 28 U.S.C. § 2254(d) 91982), is a more than adequate finding that petitioner acted, in the very least, with reckless disregard for human life.

8. Although the jury is not the sentencer in Florida's capital sentencing scheme, it is treated as such for eighth and fourteenth amendment purposes. See e.g., Hitchcock v. Dugger, __ U.S. __, 107 S.Ct. 1821 (1987).

9. In Hitchcock, the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be the following . . . ." The court then read the statutory mitigating factors set out in Fla. Stat. § 921.141 (1987). Hitchcock, ___ U.S. at ___, 107 S.Ct. at 1824.

10. In Hargrave, the trial court instructed the jury that "[t]he mitigating circumstances which you may consider, if established by the evidence, are as follows . . . ." The court then read the statutory mitigating factors set out in Fla. Stat. § 921.141 (1987). Hargrave, 832 F.2d at 1534.

Clark, Circuit Judge, specially concurring:

I concur in the result and in all of Parts I and III of the majority opinion. With respect to Part II, the Enmund issue, I concur because the Florida judiciary has made the necessary Enmund findings in Ruffin's case as required by Cabana v. Bullock, 106 S.Ct. 689 (1986). As pointed out in note 7 of the per curiam opinion, both the Florida trial court and the Florida Supreme Court considered the Enmund issue, see Ruffin v. State, 420 So.2d 591 (Fla. 1982). The Florida Supreme Court at page 594 of its opinion quotes the trial court's findings distinguishing Ruffin from Enmund and found the trial court's findings to be supported by the record.

I disagree with the analysis in the per curiam opinion based upon this statement:

> In this case, however, the jury, in finding petitioner guilty of premeditated murder, necessarily concluded that petitioner intend-

> ed Mrs. Hurst's death. An examination of the court's charge to the jury at the conclusion of the guilt phase of petitioner's trial makes this point clear.

Manuscript opn. at 5. As made clear by the Supreme Court in Cabana, a decision of an Enmund issue is not made by the jury:

> But our ruling in Enmund does not concern the guilt or innocence of the defendant--it establishes no new elements of the crime of murder that must be found by the jury. Rather, as the Fifth Circuit itself recognized, Enmund "does not affect the state's definition of any substantive offense, even a capital offense." Reddix v. Thigpen, 728 F.2d, at 709; see also Enmund, 458 U.S., at 810, n.19, 102 S.Ct., at 3383, n.19 (O'Connor, J., dissenting). Enmund holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonetheless be guilty of the crime of capital murder as defined by state law; that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill.
>
> * * *
>
> [T]he decision whether a sentence is so disproportionate as to violate the Eighth Amendment in any particular case, like other questions bearing on whether a criminal defendant's constitutional rights have been violated, has

> long been viewed as one that a trial judge or an appellate court is fully competent to make.

106 S.Ct., at 696-97 (footnote omitted).

The law is clear that a defendant is entitled to consideration of an Enmund claim notwithstanding the jury instructions.

Tjoflat, Circuit Judge, concurring in part and dissenting in part:

I concur in parts I and II of the court's opinion, and in all but the final paragraph of part III, which sets aside petitioner's death sentence. Petitioner is not entitled to a new sentencing hearing if the Lockett error was harmless beyond a reasonable doubt. Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 1824 (1987). The court, however, fails to consider the possibility that the Lockett error may have had no prejudicial effect on petitioner's sentencing proceeding. We should address the harmless error issue or remand the issue to the district court. Because the parties neither briefed the issue nor alluded to it in oral argument to this panel, I would remand the question of the prejudice caused by the Lockett error to the district court.

Hatchett, Circuit Judge, concurring in part and dissenting in part:

Although I concur in Parts I and III of the majority's opinion, I respectfully dissent from Part II of the opinion.

In Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368 (1982), the Supreme Court held that the eighth amendment forbids imposition of the death penalty on "one . . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." Enmund, 458 U.S. at 797.

In determining that Ruffin's Enmund claim fails, the majority reasons that "when the jury found petitioner guilty of murder, it necessarily determined as a fact that petitioner killed with premeditation; in other words the jury found that he intended the victim's death." Ante at ___. Moreover, the majority reasons, "[l]ogic suggests that the finding of in-

tent implicit in a verdict of premeditated murder should suffice." Ante at __.

The majority's reasoning is predicated on a false premise. The Supreme Court has made it clear that "'Enmund does not affect [a] state's definition of a substantive offense, even a capital offense.'" Cabana v. Bullock, 106 S.Ct. 689, 88 L.Ed.2d 704, 715 (1986) (quoting Reddix v. Thigpen, 728 F.2d 705, 709 (5th Cir.), cert. denied, 469 U.S. 990 (1984)). Additionally, in Cabana, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), the Court stated that "Enmund does not concern the guilt or innocence of the defendant--it establishes no new elements of the crime of murder that must be found by the jury." Cabana, 88 L.Ed.2d at 715. Rather, the Court continued, Enmund concerns only that class of persons who, although guilty of capital murder as defined by state law, may not lawfully be sentenced to death because they did not kill, attempt to kill, or intend to kill. Cabana, 88 L.Ed.2d at 716.

The majority holds that the jury's conviction of Ruffin, based on a theory of premeditated murder, satisfies all Enmund concerns. To illustrate its point, the majority refers to the trial court's jury instruction which it claims, "instructed the jury that it could not find petitioner guilty of murder unless it found premeditation on his part. See Ante at ___. Regrettably, the majority refuses to honor its own reasoning because when the jury instructions are considered as a whole, it is apparent that the jury was instructed not only on premeditated murder, but also instructed on theories of vicarious criminal liability, including aiding and abetting, and the felony murder doctrine. The jury instruction provided:

> A person may commit a crime by his own personal act, or through the act or acts of another person. Any person who knowingly aids, abets, counsels, hires, or otherwise procures the commission of a crime, is equally guilty with the one who actually performs the criminal act, whether he is or is not present at

> the commission of the offense. However, for one person to be guilty of a crime physically committed by another, it is necessary that he have a conscious intent that the criminal act shall be done, and that pursuant to that intent he do some act or say some word which was intended to and which did incite, encourage, assist, induce, or cause another person to actually commit the crime. [Emphasis added.]

This instruction allowed the jury to find Ruffin guilty of first degree murder, and to satisfy Enmund even if it found: (1) the "crime" (sexual battery or murder?) was committed "through the act or acts of another person;" (2) he was "not present at the commission of the offense;" (3) If not present at the scene of the crime, he "procure[d] the commission of [the] crime"; (4) if he had a "conscious intent that the criminal act [should] be done" although not present at the crime scene; (5) if not present and participating in the criminal act itself, he "[said] some word . . . intended to and which did incite, encourage, assist, induce, or cause another person to actually commit the

crime." According to the majority, Enmund would be satisfied, through the above quoted jury instruction, if three weeks before the murder, Ruffin had told Hall that the victim should be kidnapped and killed. Imposition of the death penalty under these circumstances is precisely the kind of scenario which the Supreme Court condemned in Enmund.

Even more regrettably, the majority has inspected the state court record and focused on an instruction that covers premeditated murder as well as felony murder theories, and mysteriously concludes that the jury convicted on the premeditated murder theory. Why not conclude that the jury convicted on the easier and more probable theory of felony murder?*

---

* In addition to the instruction on vicarious criminal liability, the jury was also informed that "[i]f the defendant, in killing the deceased, acted from a premeditated design to effect the death of the deceased, or some other human being, he should be found guilty of murder in the first degree." In this regard, this case

Because Enmund is a sentencing case comes to us in much the same posture as Cabana where, as here, the jury was instructed on several theories of criminal liability. As the Supreme Court observed:

> An instruction offered after the one [on accomplice liability] informed the jury that to find Bullock guilty of capital murder, it must find that he 'did in fact kill Mark Dickson without malice, without authority of law, and not in necessary self defense.' App 90-91. This instruction does not change our view that the jury's verdict does not necessarily reflect a finding that Bullock killed. the preceding instruction had explicitly informed the jury that it could find Bullock guilty if his accomplice had done the actual killing. The jury could well have concluded, reading the instructions together, that the instruction that Bullock must have 'in fact killed' referred only to a requirement that Bullock have committed acts that rendered him legally accountable for the killing under tne previous instruction. Under this reading of the instructions, the earlier, more specific instruction would be read as defining the legal meaning of the requirement that Bullock must have 'in fact killed.'
>
> Even if the second instruction is read as simply irreconcilable with the first, however, we cannot conclude that the jury followed the second instruction. As was the case last Term in Francis v Franklin, 471 US

and does not determine who may or may not be found guilty of first degree murder, a jury's verdict of guilty is not dispositive of Enmund's concern of whether a defendant may be lawfully sentenced to death because he in fact killed, attempted to kill, or intended to kill. More significantly, in Cabana, the Court reiterated

---

, ___, 85 L.Ed.2d 344, 105 S.Ct. 1965 (1985), '[n]othing in these specific sentences or in the charge as a whole makes clear to the jury that one of these contradictory instructions carries more weight than the other. Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.' Moreover, to the extent that one can speculate as to which of the instructions the jurors followed in this case, it seems more likely that they would have chosen the [infirm] instruction, which, though somewhat harder to follow, appears to be more comprehensive and more specifically tied to the facts presented to the jury.

Cabana, 88 L.Ed.2d at 714-15, n.2 (emphasis added).

that the inquiry into whether Enmund bars a death sentence does not end with an examination of the jury instructions: "[r]ather, the court must examine the entire course of the state-court proceedings against the defendant in order to determine whether, at some point in the process, the requisite factual finding as to the defendant's culpability has been made." Cabana, 88 L.Ed.2d at 717 (footnote omitted). Thus, by focusing exclusively on the jury instructions to determine whether Enmund has been satisfied, the majority's disposition of the Enmund issue manifests a grave misunderstanding of the Supreme Court's directive in Cabana.

In Cabana, the Court revisited Enmund for the sole purpose of delineating the "appropriate course of action for a federal court faced with an Enmund claim when the state courts have failed to make any finding regarding the Enmund criteria." Cabana, 88 L.Ed.2d at 719. Although re-

cognizing that federal and state courts are equally competent to make the factual determination of whether a defendant in fact killed, attempted to kill, or intended to kill, the Court concluded that the desirable alternative is to allow the state's judicial system to make this determination in the first instance. Cabana, 88 L.Ed.2d at 719. In so holding, the Court reasoned:

> First, to the extent that Enmund recognizes that a defendant has a right not to face the death penalty absent a particular factual predicate, it also implies that the State's judicial process leading to the imposition of the death penalty must at some point provide for a finding of that factual predicate . . . Second, the State itself has a "weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts." Rogers v. Richmond, 365 U.S. 534, 548, 5 L.Ed.2d 760, 81 S.Ct. 735 (1961).

Cabana, 88 L.Ed.2d at 719.

Notwithstanding the Court's directive that the State judicial system be given the first opportunity to make the neces-

sary Enmund findings, the majority ignores the clear dictates of Cabana by refusing to remand this case to the state courts to make the proper Enmund findings. While some would argue that the federal habeas court should make the Enmund findings since it has the record of the state proceedings, the short answer is: The Supreme Court has held to the contrary. The lesson of Cabana is that state courts must incorporate into their procedures for the handling of death penalty cases a method which requires decisionmakers to make the Enmund findings expressly.

Accordingly, I would remand this case to the state judicial system in order for it to make the appropriate Enmund findings.

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MACK RUFFIN, JR.,

Petitioner/Appellant
Cross Appellee,

v. CASE NO. 86-3485

RICHARD L. DUGGER, Secretary,
Department of Offender Corrections,
& TOM BARTON, Superintendent,
Florida State Prison at Starke, Florida

Respondents/Appellees,
Cross-Appellants.

Appeal From the United States
District Court For the Middle District
of Florida

SUGGESTION FOR REHEARING EN BANC

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Rule 11, App. 1(a)(3) and
Rule 30(b)(1)

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SUGGESTION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision of the Supreme Court of the United States and precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

(a) Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 LEd.2d 347 (1987)

(b) Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987)

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one question of exceptional importance; to wit,

> An appellate court on collateral 28 U.S.C. §2254 review must address whether a Lockett error is harmless beyond a reasonable doubt by making a determination from the record proper if the Lockett error had a prejudicial effect upon petitioner's state sentencing proceeding, or, if such determination cannot be made from the record proper, the "issue" must be remanded to the district court for a harmless error determination.

/s/ William I. Munsey, Jr.
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ISSUE ASSERTED
TO MERIT EN BANC CONSIDERATION

Whether a federal appellate court on review of a federal district court's denial of habeas corpus relief must consider and apply the harmless error doctrine to Lockett-Hitchcock questions prior to reversing the district court's order?

COURSE OF PROCEEDINGS AND DISPOSITION OF THE CASE

After oral argument on January 22, 1987, and the filing of supplemental briefs on the Enmund issue in late January, 1987, this Court on May 4, 1987 entered an Order denying appellant's request for leave to file a supplemental brief regarding recent United States Supreme Court decisions. Hitchcock v. Dugger, ___ U.S. ___, 95 L.Ed.2d 347, 107 S.Ct. 1821 was decided on April 22[illegible], 1987. On August 11, 1987, Ruffin's counsel filed a Motion for Leave to File Supplemental Brief Concerning Recent Eleventh Circuit Cases. On page two of that Motion, Ruffin's counsel asserts: "Mr. Ruffing [sic] has previously sought leave to submit a supplemental brief asserting that Hitchcock requires a new sentencing here; leave was denied by an Order of this Court filed on May 4, 1987." This Court has never ruled on this Motion.

Thus, this Court has not had the benefit of briefing as to whether a Hitchcock error, if one is present, may be harmless error.

Since oral argument, counsel for both petitioner and respondent have submitted thirteen (13) decisions of both this Court and the Florida Supreme Court focusing on the Hitchcock claim. Significantly, the Florida Supreme Court decision of Ruffin's co-perpetrator, Freddie Lee Hall, was submitted to this Court as supplemental authority on May 13, 1988, where the Florida Supreme Court decided the Hitchcock claim as "harmless error." This Court filed its opinion on June 20, 1988.

STATEMENT OF THE FACTS

At the very beginning of the sentencing phase, Judge Booth advised the jury:

> Under the rules of procedure, the state presents the aggravating circumstances, if any, which they would like you to hear, and then THE DEFENDANT HAS THE RIGHT TO PRESENT ANY MITIGATING CIRCUMSTANCES, IF ANY, THAT YOU SHOULD HEAR.
>
> (R 1 - 12A - 1352)
> (emphasis supplied)

The "state" presented Detective Mylander for the purpose of establishing aggravating circumstances. At a bench conference, defense counsel expressed his belief on what he could establish in mitigation:

> MR. KOVAC: Your Honor, the cases on this subject have given defense wide latitude to be able to explore any areas that may be relevant.
>
> (R 1 - 12A - 1358)

The prosecutor, in his closing during the sentencing urged the jury to consider three specific aggravating circumstances; and, he specifically noted that the aggravating circumstances outweighted [sic]

"any possible mitigation." (R 1 - 12A - 1384)

Judge Booth gave the standard Florida statutory jury instructions on mitigation. (R 1 - 12A - 1409) Specifically, Judge Booth did not restrict the mitigating circumstances as his admonishment states:

> The mitigating circumstances which you may consider, if established by the evidence, are these:
>
> (R 1 - 12A 1409)

After the instructions were read to the jury, Judge Booth asked both defense counsel and the prosecutor if they had objections:

> Does the State or the defendant have any objections to these instructions given?
>
> MR. BROWN: The State does not, Your Honor.
>
> MR. KOVAK: The Defense does not, Your Honor.
>
> THE COURT: Take the jury out.
>
> (R 1 - 12A - 1413)

On direct appeal, the Florida Supreme Court reached the merits as whether defense counsel had been restricted in presently non-statutory mitigating circumstances. Ruffin v. State, 397 So.2d 277, 283 (Fla. 1881).

Judge Booth projected, at a bench conference, that the defense would attempt to establish in mitigation, Mack Ruffin's youth; that Mack Ruffin was under the domination of Freddie Lee Hall; and, that Mack Ruffin acted under extreme duress. (R 1 - 12A - 1365)

After the "state" rested (R 1 - 12A - 1374), defense counsel received permission to introduce a psychiatric report describing Mack Ruffin. (R 1 - 12A - 1374) This was all defense counsel sought to establish in mitigation . . . nothing more, and nothing less than this one psychiatric report was introduced. This was a tactical decision which evolved from defense counsel's experience in the Chambers' trial. (R 1 - 12A - 1374) The obvious

advantage to Mack Ruffin was that the psychiatric report, on its face, was not subject to cross-examination. (R 1 - 12A - 1377) The psychiatric report was read to the jury by the clerk. (R 1 - 12A - 1377 through 1388) After the contents of the psychiatric report was published to the jury, defense counsel, without any attempt to establish non-statutory mitigating circumstances, rested. (R 1 - 12A - 1382)

ARGUMENT AND CITATIONS OF AUTHORITY

Respondent submits that the decision of this case is not in harmony with either Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) or Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987). In Hitchcock, the Supreme Court assumes that "harmless error" is a reasonable possibility in all cases. The Hitchcock decision did not involve fundamental error; and, there is a distinction between fundamental error and constitutional error. Thus, the claim is subject to a harmless error analysis. Why? Because the jury instructions as given do not go to either the foundation of the case or the merits of the cause of action. The jury charge is readily apparent on the face of the record proper before this Court; and, the instructions are referenced under the statement of the facts. This record does affirmatively and conclusively show no error in that Judge Booth did inform the jury that it could

consider "any" non-statutory mitigating cricumstances [sic] (R 1 - 12A - 1352); however, did the jury instructions as rendered fail to state and apply the Florida law under which Mack Ruffin was prosecuted? Respondent submits that on this record, the jury instructions as given do not represent "fundamental error" as the jury recommendation never became uncertain or meaningless. Does the record before this Court reveal error so prejudicial to the rights of Mack Ruffin that he could not have had a fair sentencing? Respondent on the basis Hitchcock and Clark submits that this issue, as noted by Judge Tjoflat (dissenting in Part III), is properly designated a precedent setting error of exceptional importance which bears consideration by this entire court.

In Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987), this Court found harmless error in a similar claim where state-court trial counsel had not introduced any mitigating evidence whatever. As counsel

for Raymond Robert Clark failed to produce evidence of nonstatutory, mitigating factors, this Court found his claim to be without merit. Why? Because there was simply no support as here, for the argument that the state trial court restricted the jury's ability to consider nonstatutory, mitigating factors. This Court then concluded that any Hitchcock error was harmless under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). To allow the Ruffin opinion to stand without resolution of the "harmless error" claim creates discord with Clark.

The "harmless error" aspect of this case was neither briefed nor addressed at oral argument. As noted by counsel for petitioner on page two of his Motion for Leave to File Supplemental Brief Concerning Recent Eleventh Circuit Cases: "Mr. Ruffin has previously sought leave to submit a supplemental brief showing that Hitchcock requires a new sentencing here; leave was denied by an order of the Court

filed May 4, 1987." That Motion was never ruled on. This Court has not had an opportunity to review either side's analysis of Hitchcock as to "harmless error," subsequent to the filing of that precedent.

It is apparent from the context of the record proper before this Court that defense counsel knew he could introduce nonstatutory, mitigating circumstances (R 1 - 12A - 1358) and that he chose, for tactical considerations, to present only a psychiatric report. (R 1 - 12A - 1377) This record contains no indication whatsoever that defense counsel was frustrated in his attempt to introduce nonstatutory, mitigating circumstances. (R 1 - 12A - 1374 through 1394) Judge Booth informed the jury that the defendant had "the right to present any mitigating circumstances." (R 1 - 12A - 1352)

This Court has denied relief on similar facts in rejecting a Hitchcock claim. Clark v. Dugger, 834 F.2d 1561, 1568 - 1569 (11th Cir. 1987). This issue

is of EXCEPTIONAL IMPORTANCE because the finding of harmless error beyond a reasonable doubt is clearly supported by the record and circumstances of the instant case; and, further such finding is in accord with numerous decisions of the Florida Supreme Court. See, Jackson v. Dugger, ___ So.2d ___, 13 F.L.W. 392 (Fla. 71, 960; Opinion filed June 16, 1988); Smith v. Dugger, ___ So.2d ___, 13 F.L.W. 390, 391 (Fla. 71,367; Opinion filed June 16, 1988); Hall v. Dugger, ___ So.2d ___, 13 F.L.W. 320 (Fla. 71,284; Opinion filed May 12, 1988); White v. Dugger, 523 So.2d 140 (Fla. 1988) as modified on Rehearing Denied April 13, 1988; Ford v. State, 522 So.2d 345 (Fla. 1988); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987); and Delap v. Dugger, 513 So.2d 659 (Fla. 1987). In light of the above authority, this case is one which is worthy of consideration for the harmless error doctrine.

This same claim was presented to the Florida Supreme Court by Freddie Lee

Hall. Your undersigned, on May 13, 1988, informed this Court of disposition of that connecting case on the day after Freddie Lee Hall was decided. Although supplemental briefing was barred by Judge Hatchett's Order of May 4, 1987, the "harmless error" doctrine was inherently presented as best it could to the panel. On collateral review, the Florida Supreme Court made a "harmless error" determination on the face of the record. Is it then appropriate, as Judge Tjoflat suggests, for this Court to address the "harmless error" issue? If for any reason this Court after rehearing the case determines that such a finding cannot be made on the face of the record, then is it not appropriate to consider remand to the district court for such a determination? The "tension" between Hall v. Dugger, ___ So.2d ___, 13 F.L.W. 320 (Fla. 71,284; opinion filed May 12, 1988) and Ruffin creates a matter of consequence which merits en banc consideration.

Capital collateral litigation does not go away. There is an identifiable number of these Hitchcock cases which both the state and federal courts are determining. The federal and state courts look to each other for guidance and uniformity in dispostion of these cases. This case is a significant one which your undersigned contends is worthy of en banc consideration.

In Hitchcock v. Dugger, 481 U.S. ___, 95 L.Ed.2d 347, 107 S.Ct. 1821 (decided April 22, 1987), the United States Supreme Court held that in that case the trial judge both in his instructions to the jury and in his own sentencing order revealed that non-statutory mitigating circumstances could not be considered. In the Ruffin case, this Court concludes that what it finds to be an ambiguous instruction alone suffices for reversible error. But at bar, trial counsel never sought to offer to the jury any non-statutory mitigating evidence! Thus, this

case is like Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987).

Why is this case subject to a "harmless error" analysis? Because this record does not even remotely suggest that defense had non-statutory, mitigating evidence to present other than what he did in fact present through the psychiatric report. Judge Booth's instructions did not tell the jury that it could not consider anything else . . . .in other words, Judge Booth did not give exclusive restrictive instructions. However, should this Court designate Judge Booth's instruction to be "ambiguous," what were the non-statutory mitigating circumstances defense counsel sought to introduce? There are none; and, habeas relief should not be available.

En Banc consideration is needed so that this Circuit has a uniform approach to these "Hitchcock" claims under the "harmless error" analysis published in Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987); and, as a matter of comity, all

members of this Court should hear argument because the Florida Supreme Court is now engaging in a "harmless error" analysis of the Hitchcock claim.

CONCLUSION

WHEREFORE, based on the foregoing reasons, argument, and authority, your respondent would pray that Judge Tjoflat; Judge Hatchett; and/or Judge Clark would reference the case to the entire Court for rehearing en banc or, in the alternative, remand the case to the district court with instructions to determine the "harmless error" issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Express Mail to Asa D. Sokolow, Esq., Naomi G. Litvin, Esq., and Todd C. Steckler, Esq., of ROSENMAN & COLIN, 575 Madison Avenue, New York, New York 10022, and Marc T. Taps, Esq., 822 North Monroe Street, Tallahassee, Florida 32303, this _____ day of July, 1988.

/s/ William I. Munsey, Jr.
OF COUNSEL FOR RESPONDENTS/
APPELLEE
Cross Appellants

IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

MACK RUFFIN, JR.,

Petitioner/Appellant
Cross Appellee,

v. CASE NO. 86-3485

RICHARD L. DUGGER, Secretary,
Department of Offender Corrections,
& TOM BARTON, Superintendent,
Florida State Prison at Starke, Florida,

Respondents/Appellees,
Cross-Appellants.

Appeal From the United States
District Court For the Middle District
of Florida

MOTION TO STAY MANDATE

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COUNSEL FOR RESPONDENTS/APPELLEES

NOW COMES the Respondents, et al, by and through the undersigned Assistant Attorney General who files the above Motion and would aver:

I.

It is your undersigned's intention to apply to the Supreme Court of the United States for a writ of certiorari. On or about July 8, 1988, Respondents filed a Suggestion for Rehearing En Banc. The timely filing of that Petition has stayed the mandate pending disposition by the court. The question to be presented addresses:

> Whether the United States Court of Appeals for the Eleventh Circuit erred in its refusal to consider and apply the harmless error rule of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) to its determination that the state trial court violated the precepts of Hitchcock v. Dugger, 481 U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

II.

This court rendered an Order on August 18, 1988, denying the Suggestion

for Rehearing En Banc. Rule 41(a), Federal Rules of Appellate Procedure provides that the Mandate shall issue seven (7) days after entry of the order denying the petition. Rule 41(B), Federal Rules of Appellate Procedure provides the authority for this court to stay the mandate pending application for certiorari review. No prejudice is visited upon Petitioner by staying the mandate as his judgment is affirmed.

WHEREFORE, Respondents pray that this Court will continue to stay the mandate pending application to the Supreme Court of the United States so that the Clerk of this court remains the custodial agent of the record proper.

/s/ William I. Munsey, Jr.
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished byU.S. Express Mail to ASA D. SOKOLOW, Esq., NAOMI G. LITVIN, Esq., and TODD C. STECKLER, Esq. of ROSENMAN & COLIN, 575 Madison Avenue, New York, New York 10022, and MARC T. TAPS, Esq., 822 North Monroe Street, Tallahassee, Florida 32303, this 23rd day of August 1988.

/s/ William I. Munsey, Jr.
OF COUNSEL FOR RESPONDENTS/APPELLEES
Cross-Appellants

(pages 1351-1352)
SECOND PHASE: ADVISORY SENTENCE

* * *

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT, AND THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: Ladies and gentlemen of the jury, you have found the defendant guilty of first degree murder. The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court; however, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

At this time the the State and the defendant may present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence is presented in order that you might

determine, first, whether or not sufficient aggravating circumstances exist which would justify the imposition of the death penalty, and secondly, whether there are mitigating circumstances sufficient to outweigh the the aggravating circumstances, if any. At the conclusion of the taking of the evidence and after arguments of the attorneys, you will be instructed on the factors in aggravation and mitigation that you may consider.

Under the rules of procedure, the State presents the aggravating circumstances, if any, which they would like you to hear, and then the defendant has the right to present any mitigating circumstances, if any, that you should hear.

The State may proceed.

* * *

(pages 1358-1359)

2nd PHASE: TOM MYLANDER/CROSS

* * *

MR. BROWN: Your Honor, if the Court please, I would enter an objection for the record at this point, I don't believe that has probative value with reference to aggravating circumstances or mitigating circumstances for this particular defendant.

MR. STONE: Your Honor, may we approach the Bench?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF JURY:

(MR. KOVAC: Your Honor, the cases on this subject have given the defense wide latitude to be able to explore any areas that may be relevant.)

(THE COURT: I think you're right. You're talking about Hall's prior convictions, is that it?)

(MR. STONE: Yes, sir.)

(MR. BROWN: Which one?)

(MR. STONE: We have only one conviction of any significance at the time of the investigation going on.)

(MR. KOVAC: He has no right to talk about the other first degree murders.)

(MR. BROWN: But you're asking him where he saw Freddie Lee Hall and have him say at the operations center, and "Did you speak to him", he said yes, "Did he tell you about Karol Hurst," he said yes; was his version of what happened different from Ruffin's?)

(MR. KOVAC: I think we have a right to do that.)

(THE COURT: I can't even indicate at this time how I ruled on that point.)

* * *

(pages 1365-1367)

2nd Phase:

* * *

WHEREUPON, THE JURY EXCUSED FROM OPEN COURT AND THE FOLLOWING PROCEEDINGS WERE HAD IN THE ABSENCE OF THE JURY:

THE COURT: I assume the defense is going to assert in its mitigating circumstances the fact that he is young, and he could have been under the influence of Hall, or, under the provision of the statute, if he was under the domination of another person or was acting under extreme duress. This is the problem, the State presents its evidence under the law, and then the defendant presents his evidence, and if this were a regular trial I think the State would be able to rebut if he, the defendant, acted under duress or substantial domination of another person. In other words, there is no coming back on rebuttal.

MR. BROWN: It says the State and the defendant will present evidence of aggravating or mitigating nature; each side will be permitted to cross examine the witnesses presented by the other side, and the State will present evidence first. It does not provide for rebuttal.

THE COURT: That's the problem, according to the statute written up by the Legislature that we have to follow, the State cannot come back and rebut. If the defendant puts facts of that mitigating circumstance in, then I think it would be proper for the State to rebut. It appears that the statement Hall made, which is substantially the same except each one says, no, the other one did it; other than that, the statements are substantially the same. If it is the defense's intention to assert that as a mitigating circumstance, which I assume certainly it will, then I think the State does have the right to go ahead and put that in evidence now, there being no way for rebuttal. The statute is

clear on it, the State has a chance to put its evidence on and then the defendant has the right; it doesn't say anything about rebuttal.

MR. BROWN: I think they put it in issue by their questioning of the witness with regard to the physical size, being muscular, being much bigger, and the rest of his appearance, and his prior criminal record, I think they have already put that mitigating circumstance in issue. I think that is further support for the State's position.

THE COURT: Take the defendant out.

DEFENDANT ESCORTED FROM COURTROOM.

THE COURT: We'll take a ten minute recess.

BRIEF RECESS.

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT, AND THE FOLLOWING PROCEEDINGS WERE HAD:

MR. BROWN: Your Honor, if the Court please, due to the seriousness of this

particular phase of the trial and in the interest of fairness, I will withdraw the question voluntarily which I asked the witness Mylander with reference to Hall's confession. I have no further questions.

MR. STONE: Nothing further of this witness.

* * *

(pages 1374-1382)

2nd Phase:

* * *

MR. BROWN: If the Court please, with the introduction of that item of evidence, the State has no further testimony to bring forth in this proceeding, and would reserve any further comment for argument.

MR. KOVAC: May we approach the Bench, Your Honor?

THE COURT: Yes.

CONFERENCE AT THE BENCH OUT OF HEARING OF THE JURY:

(MR. KOVAC: Your Honor, in Chambers we dealt with the possibility of, in lieu of calling the psychiatrist, we discussed the possibility of the psychiatric report being offered into the record as a defense exhibit in the phase two section; would the Court prefer we read it into the record? I don't know how else we can get it in the record and to the jurors. If they pass it around, it would take them three hours to read it.)

(MR. BROWN: If the Court admits it, they can take it back to the jury room with them, along with the judgment and sentence, because we didn't read the judgment and sentence, either. They can read both of them, if the Court overrules the objection I have to make to the document.)

(THE COURT: Your objection is overruled. I will permit it to be introduced into evidence. The question is whether it's to be read or just published to the jury, handed to them.)

(MR. KOVAC: I think, again, Your Honor, if we had the psychiatrist here, we would be able to derive that testimony and put it out there for the jury to hear, in his voice. We don't have that, and in the interest of time, not having that, the impact may or may not be the same as if he had the doctor here, but I think it should at least be read to them rather than take it in with them. They haven't taken anything in with them before in the preceding phase one of the trial.)

(MR. BROWN: If the Court please, I believe there's no problem in phase two in allowing them to have these two exhibits in. The reason for them not going in with them before was to preserve the chain of custody; we don't have that issue on these two items. I believe to read it into the record would allow the substantial possibility that a tone of voice or inflection or an emphasis could be raised by the person reading it, whether intentionally or not intentionally, which would go beyond the four corners of the document itself and which might not comport with the intent or meaning which the doctor places on it. I think since it is going into evidence, it should be just given to the jury as an item for them to take back with them, and they can read it and interpret it any way they want to. I won't argue anything with regard to it that would prejudice its presentation, but to allow him to read the whole thing would allow for a substantial possibility that there would

be a tone of voice or inflection given, unintentionally or intentionally.)

(MR. KOVAC: I don't think there's anything so damaging that an inflection would change it at all.)

(MR. STONE: And then they wouldn't have knowledge of what's in there until after we've made our arguments.)

(MR. BROWN: The thing I object to specifically is this paragraph three, as to inflection or tone of voice.)

(MR. KOVAC: It would have to be the clerk, and he could be instructed by the Court.)

(THE COURT: Mr. Durden, I'll ask you to read this report, and read it in a monotone.)

(MR. KOVAC: Without trying to imply any inference or change in your voice.)

(THE COURT: Without putting emphasis on any particular part.)

MR. KOVAC: Your Honor, for the record, we would move the submission of this document as Defendant's Exhibit No. 1, and

would further request that it be published to the jury.

THE COURT: It will be marked as Defendant's Exhibit No. 1.

MR. KOVAC: Your Honor, if it please the Court, at this time on behalf of the defendant we would request that Mr. Durden, Deputy Clerk, read to the jury the psychiatric evaluation report of Dr. George W. Barnard, which was prepared after an evaluation of the defendant, Mack Ruffin, on April 22, 1978, this report having previously been accepted into evidence by the Court as Defendant's Exhibit No. 1.

THE COURT: Proceed.

PSYCHIATRIC REPORT READ BY CLERK AS FOLLOWS:

"This twenty-two year old black single male prisoner was seen in psychiatric evaluation at the Lake County jail by Drs. Barnard and Ferrerra on April 22, 1978. Psychiatric evaluation was requested by the Honorable John W. Booth, Circuit Judge

of the Fifth Judicial Circuit in and for the Counties of Hernando and Sumter. Mr. Ruffin's defense attorney, William Stone, was present at the time of the evaluation.

Mr. Ruffin said he was arrested February 21, 1978, and charged with two counts of first degree murder, one count of manslaughter, rape, kidnapping, robbery, attempted murder, shooting at a motor vehicle, and grand theft.

He said he was accused of kidnapping, robbing, raping, and murdering Karol Hurst, a white female in her twenties in Sumter County, and murdering a white male whose name he did not know in Hernando County.

All the alleged crimes were said to have taken place on the date of his arrest, and he related the following story:

On the day of the alleged crimes he awoke at his home in Webster with his common-law wife, Carterie. That morning he stayed around home and watched television. At approximately nine o'clock that

morning an acquaintance, Freddie Lee Hall, came by. At about one o'clock that afternoon the two men left Ruffin's house. Hall asked Ruffin if he wanted to pull a robbery, and at that time Hall had both the thirty-eight caliber and a thirty-two caliber pistol. Ruffin handed the gun back to Hall, telling him that he did not want to get involved.

Subsequently, as they sat in a parking lot, with Hall drinking brandy, Hall told Ruffin to follow him. The two men walked up to a woman as she stood next to her car, and Hall told her to slide over. Hall drove the woman's car, and Ruffin drove his own car. Later the three of them were in the woman's car. Hall stopped the car and told the woman to take her clothes off, which she did. He had intercourse with her while Ruffin stood outside the car, and then Ruffin had intercourse with her. Later, outside the car, they talked, and Hall hit the woman on the back of the neck with his gun, and then shot her in the head.

The two men left and subsequently went to a store in order to rob it. Apparently the clerk became suspicious and called the police. The officer was in the process of shaking the two men down when Hall grabbed the officer and shot him.

The two men then left in the car and were later apprehended and placed under arrest. They have been in jail since the time of their arrest.

On the day of the alleged crimes Ruffin had no alcohol or drugs.

Previous Criminal Record: At age thirteen he was charged with snatching a pocketbook, and spent two days in jail. The charges were later dropped.

Past History: He was born in Center Hill, Florida September 24, 1955. His mother died when he was about two or three years of age, and his father died when Ruffin was about fourteen. His father was an alcoholic and accidentally burned himself to death. He is second in a sibling group of two. He was raised by Bertha

McClain, a woman who had two children by Ruffin's father, as well as children of her own. He got along with her and never ran away from home.

He quit school in the ninth grade at age sixteen. There had been no grade failures. He skipped school a good bit of the time and was suspended once in the eighth grade. He was a slow learner and had special reading classes.

After quitting school he worked at several different types of field work, picking fruit, and as a service station attendant. The longest he held a job was six months. He was fired once.

He has never been married, but has lived with several different women, and has lived with his last common-law wife since June, 1977. He has two children, aged one and two, by two different women.

He was rejected in the military because he did not have sufficient education.

Medical History: He has had no operations. He fell accidentally in 1968 and injured himself and was hospitalized for about three months. The type of injury he sustained was unknown to him. He denied any other serious injuries or illnesses. He has never been unconscious. He denied fits, seizures, or convulsions. He has had gonorrhea twice, and was treated on one occasion. He has had no serious medical illnesses. He denied any psychiatric treatment, either as an in-patient or as an out-patient. He has made no suicide attempts. Several times in the past when he was alone he has heard his name called when nobody was there. He denied any other perceptable maladies.

He began in the use of alcohol at age twenty-two. He has never been drunk, and considers himself a very light drinker. He has had no D.T.'s or shakes. He used 'pot' for the first time at age twenty-one, and denied the use of any other drugs.

Mental Status: The prisoner is a young man who appears his stated age. He is oriented to person, place and situation, and is partially oriented to time, in that he knows the day of the week, the month, and the year, but does not know the date. There is a mild deficit in both recent and remote memory. He is judged to be of dull, normal level of intelligence. He can solve practical problems which are given him, but shows some degree of poor judgment and the lack of concern for others in reaching two out of three of the solutions. There is no indication of thought disorder, and specifically no losing of associations, or delusions. He can solve four out of five proverbs, his effect is appropriate, and there is no sign of undue anxiety or depression. He understands the nature and quality of the charges against him, and understands the roles of the different participants in a trial.

Summary and Conclusions: The prisoner is a twenty-two year old black single male, charged with two counts of first degree murder, manslaughter, rape, kidnapping, and robbery. From psychiatric examination, at this time there is no indication of psychosis. It is my medical opinion that the prisoner is competent and able to assist counsel in the preparation of his defense, and it is my medical opinion that he was legally sane at the time of the alleged crimes.

George W. Barnard, M.D."

MR. KOVAC: May it please the Court, the Defense rests.

THE COURT: You may proceed, Mr. Brown.

WHEREUPON, ARGUMENT TO THE JURY ON AGGRAVATING CIRCUMSTANCES BY MR. BROWN:

(pages 1383-1384)

2nd Phase: ARGUMENT BY STATE

MR. BROWN: Ladies and gentlemen, I think that Judge Booth explained to you from the very first day of this trial that in a first degree murder prosectuion there were two phases, the first phase being the determination of the guilt or innocence of the defendant, and that phase is the one that you completed this morning.

I think that Judge Booth explained in pretty good detail that the second phase was one where you listened to testimony and considered evidence, and determined whether there were aggravating circumstances or mitigating circumstances, and whether the aggravating circumstances, on a balance, outweighed the mitigating circumstances.

I believe that in just a few minutes, after I've spoken to you, and after Mr. Stone or Mr. Kovac has had a chance to speak to you, that Judge Booth will in-

struct you again, and I believe that he will instruct you at that time that you are to weigh all these factors and determine whether or not, on that balance, the aggravatintg circumstances in Karol Hurst's murder outweigh any possible mitigating circumstances.

I believe that he will instruct you further that if you find that those aggravating circumstances do outweigh the mitigating circumstances, that it is then your duty under the law, by majority vote, to advise this Court, or recommend, that it impose the death sentence.

I believe that each of you indicated when we were talking to you on voir dire before this trial started, that none of you had ever served on a first degree murder trial before as a juror. And I asked you at that time if you were willing to accept the responsibility of being on a jury dealing with a first degree murder. And ladies and gentlemen, this is the first time that I have had to stand before

a jury dealing with a first degree murder, to ask it to return a death penalty. And it's not a responsibility which I take lightly. And it's not a burden which I do not feel.

But I do stand before you now, you, the jury, having convicted Mack Ruffin, Jr., of the premeditated murder of Karol Lea Hurst in Sumter County on February 21st, 1978. And I ask you to review the material before you, and I ask you to find that there are aggravating circumstances which exist in this murder which outweigh any possible mitigation, and which mandate that Mack Ruffin, Jr., receive that highest penalty provided by the laws of our state or our Nation. I ask you to advise this Court to impose that sentence of death.

* * *

2nd Phase: ARGUMENT BY DEFENSE

* * *

You have here a man who is twenty-two years old. He has been described as indicated by Mr. Brown, and as indicated in the psychiatric report, as being of a low or dull average intelligence. He has poor judgment. He was sixteen years old when he quit school, dropped out in the ninth grade; he obviously had failed several grades prior to dropping out of school.

He lacks education, he's had no meaningful vocational training. He was raised in a home by someone he's not related to; his mother died when he was two years old, his father died when he was fourteen, burned himself to death because he was a chronic alcoholic, he burned his house down. He was raised in a home where he had no significant parental control, or guidance, no particular concern, and complete lack of any kind of normal home life.

I recognize that the social concepts that we are totally inundated with day in and day out, they probably are overdone, but considering the totality of the circumstances, the relative relationship between Freddie Lee Hall and Mack Ruffin, and in making your determination as to the domination of this man by Hall, these factors are considerable, and they are signfiicant, and they should be considered. They are all set forth in the psychiatric report.

* * *

2nd Phase: ARGUMENT BY DEFENSE

* * *

I submit to you that that is one of the more appropriate aspects of our criminal justice system, it's the ability to take into consideration the totality of the circumstances in any given offense and punish accordingly.

You are placed in the position of being able to have the responsibility and input into making that distinction. And this, I submit to you, is a very appropriate case for your consideration in making that distinction.

The case itself, and the totality of the circumstances, do not mandate a death penalty for this man.

Thank you.

THE COURT: Take the jury out, please.

JURY EXCUSED FROM OPEN COURT.

THE COURT: Take the defendant out.

DEFENDANT ESCORTED FROM COURTROOM.

THE COURT: Court will be in recess for ten minutes.

BRIEF RECESS.

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT, AND THE FOLLOWING PROCEEDINGS WERE HAD:

WHEREUPON, COURT'S CHARGE TO JURY ON ADVISORY SENTENCE.

* * *

(pages 1407-1414)

2nd Phase: COURT'S CHARGE

THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of first degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law hwich will now be given you by the Court, and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your verdict should be based upon the evidence which has been presented to you during these proceedings.

The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

(a) That the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment;

(b) That at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person;

(c) That the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons;

(d) That the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, arson, burglary, kid-

napping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

(e) That the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(f) That the crime for which the defendant is to be sentenced was committed for pecuniary gain;

(g) That the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

(h) That the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.

"Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

If you do not find that there existed sufficient of the aggravating circumstances which have been described to you, it will be your duty to recommend a sentence to life imprisonment.

Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these:

(a) That the defendant has no significant history of prior criminal activity;

(b) That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence or extreme mental or emotional disturbance;

(c) That the victim was a participant in the defendant's conduct or consented to the act;

(d) That the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor;

(e) That the defendant acted under extreme duress or under the substantial domination of another person;

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform to or conform his conduct to the requirements of law, was substantially impaired;

(g) The age of the defendant at the time of the crime.

Aggravating circumstances must be established beyond a reasonable doubt before they may be considered by you in arriving at your decision. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction

that the circumstance has been proved to the exclusion of and beyond a reasonable doubt.

Evidence tending to establish an aggravating circumstance which does not convince you beyond a reasonable doubt of the existence of such circumstance at the time of the offense, should be wholly disregarded.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating circumstances exist which outweigh any aggrava-

ting circumstances found to exist. Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.

In these proceedings it is not necessary that the verdict of the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury.

The fact that the determination of whether or not a majority of you recommend a sentence of death or a sentence of life imprisonment in this case can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that a human life is at stake, and bring to bear your best judgment upon the sole issue which is submitted to you at this time: Whether a majority of your number recommend that the

defendant be sentenced to death or to life imprisonment.

Should a majority of the jury determine that the defendant should be sentenced to death, you should recommend an advisory sentence as follows:

A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, C. Mack Ruffin, Jr.

On the other hand, if, after considering all the law and the evidence touching upon the issue of punishment, a majority of the jury determine that the defendant should not be sentenced to death, then you should render an advisory sentence as follows:

A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant, C. Mack Ruffin, Jr.

The law requires that seven or more members of the jury agree upon any recommendation advising either the death pen-

alty or life imprisonment. You will now retire to consider your recommendation, and when seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned into court.

I am going to give these instructions to the bailiff to hand to the foreman, and I am also going to give the bailiff the two advisory sentences, which I will read to you at this time:

A majority of the jury advise and recommend to the Court that it impose a sentence of life imprisonment upon the defendant, C. Mack Ruffin, Jr. Dated this blank day of blank, 1978. With a place for your foreman to sign.

The other form of advisory sentence is as follows:

A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, C. Mack Ruffin, Jr. Dated this blank

day of blank, 1978. With a place for your foreman to sign.

Does the State or the defendant have any objections to these instructions as given?

MR. BROWN: The State does not, Your Honor.

MR. KOVAC: The Defense does not, Your Honor.

THE COURT: Take the jury out.

WHEREUPON, JURY RETIRED TO CONSIDER ITS ADVISORY SENTENCE, COURT STANDING BY.

(THERE BEING NO OBJECTION BY ANY COUNSEL TO THE EXHIBITS UPON THEIR INSPECTION, EXHIBITS DELIVERED TO JURY.)

WHEREUPON, COURT RECONVENED, THE DEFENDANT IS PRESENT, THE JURY RETURNED TO OPEN COURT WITH ITS ADVISORY SENTENCE RECOMMENDATION, AND THE FOLLOWING PROCEEDINGS WERE HAD:

THE COURT: Mr. Ford, has the jury arrived at an advisory sentence?

JURY FOREMAN: Yes, we have, Your Honor.

THE COURT: Hand it to the bailiff.

ADVISORY SENTENCE HANDED TO BAILIFF, INSPECTED BY THE COURT, PASSED TO THE CLERK FOR PUBLISHING AS FOLLOWS:

In the Circuit Court of the Seventh Judicial Circuit of the State of Florida, In and For Putnam County. Criminal Case Number 78-433-CF. State of Florida versus C. Mack Ruffin, Jr., Defendant.

Advisory Sentence:

A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, C. Mack Ruffin, Jr. Dated this 20th day of July, 1978. James D. Ford, Foreman.

IN THE CIRCUIT COURT OF FLORIDA
SEVENTH JUDICIAL CIRCUIT, IN AND
FOR PUTNAM COUNTY

CASE NO: 78-433 CF

THE STATE OF FLORIDA

vs

MACK RUFFIN, JR.

Defendant.

FINDINGS OF FACT

THIS CAUSE coming on this day to be considered pursuant to the provisions of Section 921.141, Florida Statutes, after (a) the conviction of the Defendant, Mack Ruffin, Jr., of Murder in the First Degree, by a duly impaneled jury, and (b) the rendition by such jury at the conclusion of the sentencing proceeding of an Advisory Sentence recommending the imposition of the death sentence, and after carefully considering and weighing the evidence presented during such trial and sentencing proceeding, the arguments of the attorneys as to the sentence to be imposed, the undersigned concludes and determines:

1. That the State proved beyond a reasonable doubt the following aggravating circumstances, to wit:

(a) That at the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of another capital offfense or of a felony involving the use or threat of violence to some person.

(b) That the crime for which the Defendant is to be sentenced was committed while the Defendant was engaged in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

(c) That the crime for which the Defendant is to be sentenced was especially heinous, atrocious or cruel:

> Heinous means extremly [sic] wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain.

and the State failed to prove beyond a reasonable doubt the following aggravating circumstances, to wit:

(a) That the crime for which the Defendant is to be sentenced was committed while the Defendant was under sentence of imprisonment:

(b) That the Defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

(c) That the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape.

(d) That the crime for which the Defendant is to be sentenced was committed for pecuniary gain.

(e) That the crime for which the Defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

2. That the Defendant Ruffin proved the following mitigating circumstances, to wit: age of the defendant at the time of the crime.

3. That the Defendant Ruffin failed to establish by evidence any other mitigating circumstances and upon consideration only of the records of such trial and sentencing proceedings and the evidence properly introduced herein make the following:

* * *

ORIGINAL

Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-568

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD L. DUGGER,
Secretary, Florida Department
of Offender Rehabilitation and
TOM BARTON, Superintendent
Florida State Prison at Starke, Florida,

Petitioners,

vs.

MACK RUFFIN, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ASA D. SOKOLOW *
RICHARD L. CLAMAN
TODD C. STECKLER
575 Madison Avenue
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Attorneys for respondent
Mack Ruffin, Jr.
* Counsel of Record

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals should be required under Hitchcock v. Dugger, 481 U.S. 393 (1987) to discuss explicitly whether an error in restricting a jury from considering nonstatutory mitigating factors at a capital sentencing hearing might be harmless where the petitioner never argued that the error was harmless and the record contains patent indicia of harmful error?

2. Whether this Court should grant certiorari when other reasons, including a recent Supreme Court decision, Johnson v. Mississippi, ___ U.S. ___, 108 S.Ct. 1981 (1988), independently warrant the relief granted by the Eleventh Circuit?

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No. 88-568

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD L. DUGGER,
Secretary, Florida Department
of Offender Rehabilitation and
TOM BARTON, Superintendent
Florida State Prison at Starke, Florida,

Petitioners,

vs.

MACK RUFFIN, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PRELIMINARY STATEMENT

The State ("petitioners") here attacks a now typical decision of the Eleventh Circuit, Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988), granting Mr. Ruffin ("respondent") a new sentencing hearing based on the authority of Hitchcock v. Dugger, 481 U.S. 393 (1987). The State objects to the Eleventh Circuit's failure to discuss expressly whether the Hitchcock error could have been harmless error, even though the State had never previously argued that the error was harmless and even though there was patent harmful error. Indeed, even now the State does not argue that as

a matter of the factual record the error was harmless. Contrary to the State's assertions, the Eleventh Circuit's decision to vacate the death sentence subject to a new sentencing hearing was the appropriate remedy and the decision presents no conflicts with other Eleventh Circuit cases or Florida Supreme Court decisions.

In any event, the Eleventh Circuit's order of a new sentencing hearing is independently justified by other bases for that relief. Accordingly, this is not an appropriate case for an issuance of this Court's writ.

STATEMENT OF THE CASE

Ruffin was convicted of premeditated murder and sentenced to death for the killing of Karol Hurst, which was actually committed by Freddie Lee Hall. The evidence in the case as to Ruffin's role in the Hurst killing is set forth in Ruffin's petition for a writ of certiorari (which is being filed simultaneously herewith, and to which this Court is respectfully referred). That evidence consists of Ruffin's statement to the police, in which he explained that he did not have a gun at the time, that he sought to convince Hall not to kill Hurst, and that he did not foresee Hall's lethal attack on Hurst, which followed Hall's cry that "he [Hall] done been up one time . . . he [Hall] wasn't going back, for nobody."[1] (TR 1239).

A. Nonstatutory Mitigating Evidence Presented During The State Court Sentencing Proceeding

Ruffin presented a psychiatric report in mitigation (TR 1377-1382[2]). The report, made by a state-appointed psychiatrist

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1 Ruffin had no prior criminal record. Hall had previously served a prior sentence for rape.

2 References to the trial transcript are designated "TR __"; (footnote continued)

to consider Ruffin's competency to stand trial, contained information concerning nonstatutory mitigating factors such as Ruffin's deprived childhood, low intelligence and poor judgment. The defense also argued that Ruffin had no prior history of criminal activity, that Ruffin was young and his participation in the crime was relatively minor, and that Hall's size, age and prior criminal experience in contrast with respondent's slighter build, youth and low intelligence showed domination by Hall. (TR 1395-1398).

B. The Lockett/Hitchcock Violation

In his closing argument, the prosecutor specifically told the jury that Ruffin's low intelligence, mentioned in the report, was not a mitigating circumstance to be considered. (TR 1391-1392).

During the capital sentencing phase of respondent's trial Judge Booth instructed the jury as follows:

> Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these . . .

(TR 1407-1409). The court then listed the seven statutory mitigating circumstances set forth in Section 921.141 of the Florida Statutes (1985).

After the penalty phase, the jury recommended the death penalty, without specifying the mitigating and aggravating circumstances. The judge imposed the death penalty for the murder.[3] He

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references to other portions of the record before the Eleventh Circuit are designated "R __" and specified by volume and document or page number in accordance with the conventions of that court.

3 Ruffin was also convicted of sexual battery and sentenced to 30 years imprisonment.

found one mitigating circumstance, "[t]he age of the defendant at the time of the crime," and stated that respondent had failed to show any other mitigating circumstances.[4] (TR 1417-1418). The judge found three aggravating circumstances:

> That at the time of the crime for which he is to be sentenced, this defendant had been previously convicted of another capital offense or a felony involving the threat of violence to some person;
>
> That the crime . . . was committed while the defendant was engaged in the commission of, or the attempt to commit, or in flight after committing or attempting to commit any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;
>
> That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.

(TR 1417-1419).[5]

The judgments and sentences were filed on July 21, 1978. Ruffin made a motion for a new trial which was denied on August 3, 1978.

C. Post-Conviction Proceedings

On direct appeal, on collateral review in the Florida courts, before the federal district court and before the Eleventh Circuit, Ruffin raised the argument that the jury's consideration of nonstatutory mitigating evidence was unconstitutionally limited. See Ruffin v. State, 397 So. 2d 277, 283 (Fla. 1981); Ruffin v. Wainwright, No. 82-196-Civ-Oc-16 (M.D. Fla. May 21, 1986) (order

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4 The judge did not consider the nonstatutory mitigating factors, as is clear from his finding that only one mitigating circumstance -- defendant's age -- had been shown. Respondent's trial judge was the judge in Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985), cert. denied, U.S. , 107 S. Ct. 1982 (1987), who stated that he believed that Florida law limited mitigating circumstances to those set forth in the Florida statute.

5 As noted infra, each of these findings was improper.

denying writ of habeas corpus); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir.) (per curiam). The State did not argue harmless error in these proceedings; rather it argued that no Lockett error occurred because (1) the jury was not affirmatively told that the list of statutory mitigating factors was exhaustive and (2) Ruffin was allowed to introduce evidence of nonstatutory mitigating factors during the sentencing phase of his trial. See Brief of Appellee in the United States Court of Appeals for the Eleventh Circuit at 29-30.

The district court erroneously accepted the State's claim that no Lockett error occurred, and stated that Ruffin "was allowed to introduce evidence of nonstatutory mitigating circumstances during the sentencing phase of his trial, and nothing in the record supports the contention that this evidence was not considered by the advisory jury." Ruffin v. Wainwright, No. 82-196-Civ-Oc-16 at 15, see State's Petition for Writ of Certiorari at A-3 (hereinafter "Petition").

Ruffin then appealed to the Eleventh Circuit Court of Appeals. Again Ruffin argued that the trial court had impermissibly limited the consideration of nonstatutory mitigating circumstances in the sentencing phase of the trial in violation of Lockett. The Eleventh Circuit heard oral arguments on January 31, 1987.

The Supreme Court decided Hitchcock v. Dugger on April 25, 1987. Thereafter, on April 30, 1987, Ruffin filed a motion for leave to file a brief concerning recent Supreme Court decisions, including Hitchcock. The leave was denied by order of Judge Hatchett on May 4, 1987. On August 11, 1987, Ruffin filed another motion, this time seeking leave to file a brief concerning two

recent Eleventh Circuit decisions, relating to, inter alia, Hitchcock. The State filed an opposition to this motion on August 17, 1987. The Eleventh Circuit has never issued an order concerning this motion. During the period from July 20, 1987 through June 13, 1988, both Ruffin and the State supplied the Eleventh Circuit with notices of supplemental authority relating to the Lockett/Hitchcock issue.

Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988) (per curiam) was decided on June 20, 1988. The Eleventh Circuit reversed the decision of the district court and held that respondent's sentence was unconstitutional in light of Lockett v. Ohio, 438 U.S. 586 (1978) (plurality) and Hitchcock v. Dugger, 481 U.S. 393 (1987), because the jury had been restricted in its consideration of mitigating circumstances to those enumerated in the Florida statute. In light of this error, the Court of Appeals remanded Ruffin's "Lockett claim to the district court with instructions to enter an order granting the application for a writ of habeas corpus, unless the State within a reasonable period of time either resentences [Ruffin] in a proceeding that comports with the requirements of Lockett or vacates the death sentence and imposes a lesser sentence consistent with law." 848 F.2d at 1519.

Having lost on the Lockett/Hitchcock issue in the Eleventh Circuit, the State filed a suggestion of rehearing en banc, on July 8, 1988. Even in that suggestion, the State does not contend that there were not substantial non-statutory mitigating circumstances in the record; the State merely reiterates in a confused fashion its previous points. The State's suggestion was denied by the Eleventh Circuit on August 18, 1988.

REASONS FOR DENYING THE WRIT

THE ALTERNATIVE HOLDING BELOW GRANTING HABEAS RELIEF UNDER *Witherspoon* WAS UNANIMOUS AND IS NOT WORTHY OF REVIEW BY THIS COURT.

A. This Court Should Not Consider The Harmless Error Issue Because The State Failed To Timely Raise The Issue In The Court Below

The State claims that the Court of Appeals for the Eleventh Circuit failed to apply a harmless error analysis before granting relief under *Witherspoon*. In effect, the State is criticizing the Eleventh Circuit panel for deciding to engage in unnecessary analysis concerning harmless error, when the State never argued the issue and the *Witherspoon* error was clearly prejudicial. Such a complaint by a properly supported harmless error argument does not present an important legal issue worthy of consideration by this Court.

The failure to raise the harmless error issue in the court below is fatal. As this Court has often stated, "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *see, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981); *United States v. Irvin*, 327 U.S. 203, 220 (1946); *Connecticut v. United Mine Workers*, 316 U.S. 369, 370 (1942). This rule has been applied in the harmless error context as well. *See Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen v. Spain*, this Court declined to engage in a *Chapman v. California*, 386 U.S. 18 (1967) harmless error analysis concerning the improper admission into evidence of a defendant's post-arrest statements taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). The reason for this Court's refusal

was the State's failure to raise the issue in the court below. Berkemer v. McCarty, 468 U.S. at 443.

Despite the opportunity, the State concededly failed to argue in its lead brief or upon oral argument before the Eleventh Circuit that the instructions presented to the jury at respondent's sentencing hearing, if erroneous, were harmless. Petition at 19. Moreover, the Eleventh Circuit never barred the State from further briefing on the Hitchcock issue, despite the State's assertions to the contrary. Petition at 13. Judge Hatchett's May 4, 1987 order only denied Ruffin's request for supplemental briefing. Petition at A-4. The State never moved for supplemental briefing on the Hitchcock issue and apparently had no desire to brief the issue; indeed in its motion in opposition to Ruffin's motion for leave to file a supplemental brief it stated:

> [Ruffin] has submitted a most competent and inclusive nine page motion which functions as the equivalent of a supplemental brief. The Hitchcock claim is one that this court has not ignored; and at this juncture there is little that supplemental briefing on this case would accomplish in light of the internal Eleventh Circuit decisions now being filed. (App. at 2a.)[6]

The State's Motion in Opposition to Ruffin's Motion for Leave to File Supplemental Brief, at 2.

The State raised the harmless error issue for the first time in a suggestion for a rehearing en banc. This is not sufficient to constitute a timely raising of the issue for this Court's review. See Hoover v. Ronwin, 466 U.S. 558, 574 n.25 (1984) (argument raised for the first time in response to motion for rehearing in the court of appeals precludes Supreme Court consideration). In any event, the Eleventh Circuit denied the

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6 App. refers to the Appendix attached hereto.

State's suggestion for a rehearing en banc on the harmless error issue.[7] (App. at 3a).

B. No Conflict Exists Between The Ruffin Decision, Other Eleventh Circuit Opinions And Florida Supreme Court Decisions Concerning The Application Of Harmless Error To Lockett/Hitchcock Claims

The State claims that the Ruffin decision conflicts with Eleventh Circuit precedent and Florida Supreme Court rulings. There is no indication, however, that the Ruffin court misapplied in any respect the harmless error doctrine. The Eleventh Circuit is well aware of its responsibility to apply the Chapman harmless error standard to Hitchcock errors and has applied it where appropriate. Compare Clark v. Dugger, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (instructional error harmless where defendant "failed to produce evidence of any nonstatutory mitigating factors") cert. denied, ____ U.S. ____, 108 S. Ct. 1282 (1988) with Magill v. Dugger, 824 F.2d 879, 893-894 (11th Cir. 1987) (instructional error not harmless where nonstatutory mitigating factors introduced along with compelling statutory mitigating circumstances).

No conflict exists between the Ruffin decision and Florida Supreme Court opinions. The Florida Supreme Court has likewise held that the Chapman harmless error standard applies to Hitchcock claims. Compare White v. Dugger, 523 So. 2d 140 (Fla.) (instructional error harmless where proffered nonstatutory mitigating factors "would conclusively have had no effect" upon the advisory verdict), cert. denied, ___U.S.___, 109 S. Ct. 184 (1988) with Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988) (instructional error

7 In the Eleventh Circuit a copy of the suggestion for a rehearing en banc is distributed to each panel judge and every active judge of the court. Eleventh Circuit Operating Procedures, Rule C.4.b.(1).

not harmless where significant nonstatutory mitigating evidence introduced).

The State contends that the Court of Appeals in deciding Ruffin "rejected" Hitchcock. To the contrary, the Eleventh Circuit followed Hitchcock, which explicitly discusses the threshold showing necessary to trigger harmless error review:

> Respondent [Dugger] has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing, our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock v. Dugger, 107 S. Ct. at 1824.

The State's argument rests on the faulty assumption that the Eleventh Circuit never considered harmless error in the Ruffin decision. Judge Tjoflat, in his dissent, suggests remanding the case to the district court to consider harmless error in light of the parties' failure to brief the issue. But surely Judge Clark and Judge Hatchett read the dissent and would have ordered this option if they thought it worthy. Moreover, every panel member in Ruffin and every active judge in the Eleventh Circuit reviewed the State's harmless error argument as set forth in its motion for a rehearing en banc. The Court rejected the State's argument, and not one judge requested that the Court be polled on a rehearing. (App. at 3a).

C. The Decision Granting Petitioner A Resentencing Hearing Should Be Upheld In Light Of The Harmfulness Of The Hitchcock Error

The jury instruction in Ruffin was improper and clearly not harmless. The jury at respondent's capital sentencing hearing was not permitted to consider proffered evidence of significant and relevant nonstatutory mitigating circumstances in violation of the

rules set forth in Lockett and Hitchcock. This evidence included information on respondent's deprived childhood, low intelligence and poor judgment. This evidence, if accepted by the jury along with the other evidence, would undoubtedly have been relevant to whether Ruffin was deserving of the death penalty. Thus under the standard set forth in Chapman, there is clearly a reasonable possibility that the error complained of "might have contributed" to the sentencing determination. See Chapman v. California, 386 U.S. 18, 23 (1967). Nor can it go unnoticed that the State does not currently contend that the Hitchcock error was harmless or purport to show that it was harmless. Instead, the State only asserts that the Eleventh Circuit Court of Appeals failed to consider harmless error, because the court never explicitly mentioned harmless error.

II. OTHER REASONS INDEPENDENTLY WARRANT THE RELIEF GRANTED BY THE ELEVENTH CIRCUIT

In any event, the decision below to vacate Ruffin's death penalty and remand for a new sentencing hearing is warranted by the recent decision of this Court in Johnson v. Mississippi, ___ U.S. ___, 108 S. Ct. 1981 (1988) (plurality). As in Johnson v. Mississippi, the State in Ruffin relied on an aggravating circumstance, a prior conviction, that subsequent to the sentencing hearing was vacated. Both judge and jury premised Ruffin's sentence on misinformation of constitutional magnitude concerning the killing of Deputy Coburn. The prosecutor stressed in his closing argument that Ruffin stood convicted for the premeditated murder of Deputy Coburn. However, the Coburn first degree murder conviction was later ruled unconstitutional and reduced to second degree murder because the evidence did not support a finding of intentional murder. Hall v. State, 403 So.

2d 1319, 1320-21 (Fla. 1981). Had the sentencer known that there was no basis for the premeditated murder conviction, and considering Ruffin's background and character, the balancing process would have likely weighed in favor of a life sentence. The district court's holding that any prior conviction would have been given the same weight deprived Ruffin of his right to have the jury, as well as the judge, sentence him on the basis of accurate information concerning his background and character. Accordingly, the sentence was based on "misinformation of a constitutional magnitude" and cannot stand. See also Zant v. Stephens, 462 U.S. 862, 885, 887 n.23 (1983); United States v. Tucker, 404 U.S. 443, 447-49 (1972).

A new sentencing procedure is furthermore required here because Ruffin received ineffective assistance of counsel at the sentencing phase of his trial, under Strickland v. Washington, 466 U.S. 668 (1984). The only evidence defense counsel introduced in mitigation was a psychiatric report made by a state-appointed psychiatrist to show that Ruffin was capable of standing trial. (R1-12A-R191-2). Although that report contained substantial evidence of Ruffin's deprived childhood, his low intelligence and his poor judgment, it presented a far from complete picture of Ruffin.

In the district court, Ruffin offered, without contradiction, affidavits from his family, friends, employer, ministers and from a psychologist, which showed that trial counsel had neither investigated nor analyzed available mitigating evidence. (R4-43). The affiants who knew Ruffin stated that he was well regarded in the community, showed a great concern for others, was kind, generous and loving, was naive and slow to learn but was an industrious worker, was religious and active in his church and, because of his

sorry childhood, craved approval and was a follower.[8] They would have testified that Hall, on the other hand, was a dominating and threatening person -- physically, verbally and mentally[9] -- and that Ruffin was dominated by Hall, a man significantly older and larger than Ruffin.

The psychologist's report presented to the district court showed that (a) Ruffin only had the mental ability of a person between twelve and thirteen years old, (b) he never had a close friendship with a man nor any role model before his involvement with Hall, (c) he felt sorry for Hall because Hall had no friends and Ruffin could identify with that deprivation, (d) Ruffin's motivation for accompanying Hall on the day of the killing was his desire for approval and friendship, (e) as the events of the Hurst scenario unfolded Ruffin acted out of fear of Hall, (f) Ruffin is a shy, "mild mannered," non-aggressive and "naive" young man who would need protection in a prison environment, (g) he "did not evidence a criminal type personality" and "[h]is social and moral values . . . [are] the same type as those of most of our society" (Report by Elizabeth A. McMahon annexed to the McMahon affidavit submitted in R4-43).

The District Court rejected Ruffin's ineffective assistance claim without a hearing on the ground that, assuming trial counsel was inefffective in failing to present this type of evidence, Ruffin could not "establish the prejudice component of the Strickland test because the evidence would have only barely

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8 Ruffin's own counsel told the jury that Ruffin was not virtuous or a church-goer (TR 1401). Had he bothered to gather evidence from the community he would have found otherwise.

9 Hall's size, violent nature and prior criminal record caused people in the community to fear him. See, e.g., affidavits of Donnie Bell Swint ¶¶ 13-14, L.C. Lyons ¶¶ 8-9, Richard Grant ¶¶ 2, 7, 8, 11 (R4-43).

[affected] the sentencing profile [which had been] presented to the judge and jury" by trial counsel (R4-46-18, 19). A comparison of the affidavits proffered to the district court with the report of the state-appointed psychiatrist clearly shows that the district court's conclusion was wrong.[10]

Finally, a new sentencing proceeding is required because (i) the State relied on the "heinous, atrocious and cruel" aggravating circumstance, which is unconstitutionally vague, especially where, as here, Ruffin did not intend or commit the killing, see Maynard v. Cartwright, ___U.S.___, 108 S. Ct. 1853 (1988); (ii) the State relied on the robbery and kidnapping aggravating circumstance although Ruffin had no notice thereof and the jury was not charged on the elements of robbery or kidnapping; (iii) the State improperly relied on Ruffin's conviction for the Coburn killing, which occurred after the crime at issue in this case, both to establish the aggravating circumstance of a prior criminal conviction, and to deprive Ruffin of the mitigating circumstance of "no significant history of prior criminal activity" (emphasis added); (iv) the trial court's instructions improperly imposed the burden on Ruffin of proving that mitigating circumstances outweighed aggravating circumstances; and (v) the trial court failed to weigh the mitigating circumstances of domination by Hall, and minor participation by Ruffin, which were established here.

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10 See Ruffin v. State, 420 So.2d at 595 (dissent) (". . . Ruffin is entitled to a new sentencing proceeding because of ineffective assistance of counsel in that phase of the trial. His counsel presented no live evidence in the sentencing proceeding despite a strong suspicion that Ruffin was under the domination of Freddie Hall and that his personal history has traits similar to those the United States Supreme Court felt appropriate in Eddings v. Oklahoma . . . . There is no reason evident why any responsible counsel would not have done this.")

These many additional errors confirm that the Hitchcock error here was harmful, and indicate that this case is not an appropriate one for Supreme Court review; rather, the Eleventh Circuit's decision, to remand for a new sentencing proceeding, should be left undisturbed.

CONCLUSION

Based upon the foregoing, respondent requests this Court to deny the State's petition for writ of certiorari.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MACK RUFFIN, JR.,	)	
	)	
Petitioner-Appellant,	)	
Cross-Appellee,	)	
	)	
v.	)	CASE NO. 86-3485
	)	
LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,	)	
	)	
Respondents-Appellees,	)	
Cross-Appellants.	)	

RESPONDENT'S MOTION IN OPPOSITION
TO PETITIONER'S MOTION FOR LEAVE
TO FILE SUPPLEMENTAL BRIEF

NOW COMES the custodian, by and through the undersigned Assistant Attorney General, who files this Response in Opposition to supplemental briefing and as grounds therefor would aver:

I.

On May 4, 1987, Judge Hatchett entered an order denying Petitioner's request for supplemental briefing. That Order now serves as law of the case.

II.

Counsel for the custodian would pause to point out that Petitioner has submitted a most competent and inclusive nine page motion which serves as the functional equivalent of a supplemental brief. The Hitchcock claim is one that this Court has not ignored, and, at this juncture, there is little that supplemental briefing on this case would accomplish in light of the internal Eleventh circuit decisions now being filed.

WHEREFORE, counsel for the custodian prays that this Honorable Court make and enter an Order denying further supplemental briefing.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUG 18 1988
MILES J. CAPLE
CLERK

NO. 86-3485

HACK RUFFIN, JR.,

Petitioner-Appellant-
Cross-Appellee,

versus

RICHARD L. DUGGER, Secretary, Florida Department of Offender Rehabilitation, and TOM BARTON, Superintendent, Florida State Prison at Starke, Florida,

Respondents-Appellees-
Cross-Appellants.

Appeals from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion June 22, 1988, 11 Cir., 198__, ____F.2d____).

Before TJOFLAT, HATCHETT and CLARK, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the Judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

ORD-41

Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

(3)

No. 88-568

RICHARD L. DUGGER, et al,

Petitioner,

v.

MACK RUFFIN, JR.,

Respondent.

**PETITIONER'S REPLY BRIEF
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1.

Whether this Court should accept jurisdiction to summarily dispose of the case as the dissenting opinion below discloses that the panel did not consider harmless error in automatically vacating the death sentence for a Lockett-Hitchcock violation which is contrary to 28 U.S.C. s.2111? (As stated by Petitioner)

2.

Whether this Court should grant certiorari when other reasons, including a recent Supreme Court decision, Johnson v. Mississippi, __ U.S. __, 108 S.Ct. 1981 (1988), independently warrant the relief granted by the Eleventh Circuit? (As stated by Respondent)

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Whether this Court should grant certiorari when other reasons, including a recent Supreme Court decision, Johnson v. Mississippi, __ U.S. __, 108 S.Ct. 1981 (1988), independently warrant the relief granted by the Eleventh Circuit? (As stated by Respondent)

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OTHER AUTHORITIES:

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PRELIMINARY STATEMENT

Petitioner files this supplemental brief to answer the arguments set forth by Respondent; and Petitioner continues to urge reasons why this Court might well be inclined to grant the writ.

REASONS FOR GRANTING THE WRIT

ISSUE I

> Whether this Court should accept jurisdiction to summarily dispose of the case as the dissenting opinion below discloses that the panel did not consider harmless error in automatically vacating the death sentence for a Lockett-Hitchcock violation which is contrary to 28 U.S.C. s.2111? (As stated by Petitioner)

Respondent's argument is that Petitioner failed to argue harmless error in his lead brief below; and, thus is now precluded from urging harmless error as a basis for this Court's review.

What Respondent overlooks and fails to consider is that harmless error was presented by Mr. Dugger to the Eleventh Circuit. Briefs filed in the Eleventh Circuit are governed by their local rules. The significant local rule is U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A. This rule addresses briefs and their contents. Specifically, the Rule states:

(g) **Statement of the Case.** In the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the volume, document number and page number of the original record where the matter relied upon is to be found. The statement of the case shall include:

(i) course of proceedings and dispositions in the court below. IN A CRIMINAL CASE THE PARTY SHOULD STATE WHETHER THE DEFENDANT IS INCARCERATED;

(ii) a statement of the facts. A proper statement of facts reflects a high standard of professionalism. It must state the facts accurately, those favorable and those unfavorable to the party. Inferences drawn from facts must be identified as such.

(iii) a statement of the standard or scope of review for each contention. For example, where the appeal is from an exercise of district court discretion, there shall be a statement that the standard of review is whether the district court abused its discretion. The appropriate standard or scope of review for other contentions should be similarly indicated, e.g., that the district court erred in formulating or applying a rule of law; or that there is insufficient evidence to support a verdict; or that fact findings of the trial judge are clearly erroneous under Fed.R.Civ.P.

> 52(a); or that there is a lack of substantial evidence in the record as a whole to support the factual findings of an administrative agency, or that the agency's action, findings and conclusions should be held unlawful and set aside for the reasons set forth in 5 U.S.C. s. 706(2).

The local rule directs the parties to set forth the standard and/or scope of review for each contention. See, U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A. Your Petitioner published the following as his last paragraph in his statement of the case:

> "Matters of law are, of course, subject to the normal harmless error standard of review."
>
> (Brief of Respondents/Appellees Cross-Appellants at page 7)

Petitioner has not defaulted below in asserting that the proper scope of review and/or traditional standard of review for a collateral habeas court is harmless error. Petitioner, in his lead brief below, urged that certiorari had been

granted in Hitchcock v. Wainwright, No. 85-6576, and that oral argument was calendared for October 15, 1986. This Court rendered its Hitchcock decision on April 22, 1987. Oral argument in the Eleventh Circuit on behalf of Mack Ruffin was January 21, 1987, prior to this Court's opinion in Hitchcock. Subsequently, after this Court spoke in Hitchcock, Judge Hatchett, below, rendered an Order on May 4, 1987, barring further supplemental briefing. The collateral record proper below demonstrates that Mr. Ruffin sought to file supplemental briefs on recent Eleventh Circuit cases which addressed Hitchcock. Had supplemental briefing been allowed, the custodian would have amplified that this Court's decision in Hitchcock assumes that harmless error is a reasonable possibility in all cases. The Hitchcock case does not involve fundamental error. Thus, had Judge Hatchett not barred supplemental briefing,

your Petitioner would have had an opportunity to have pointed out the distinction between fundamental error and constitutional error, which, of course, is subject to a harmless error analysis.

As Petitioner urged the harmless error doctrine as the standard of review for the contentions before the Court below, it cannot be said that there is a waiver; by-pass; or, procedural default which acts as a bar to this Court's consideration of the Hitchcock claim. Thus, Petitioner does not concede that he raised the "harmless error" argument for the first time in the motion for rehearing in the Court of Appeals. The issue was timely raised in the lead brief filed by Mr. Dugger below when the traditional "harmless error" standard of appellate review was advocated as to matters of law. Under these procedural circumstances, the issue was raised in a timely manner and this Court's consideration of the question

is not precluded under Hoover v. Ronwin, 466 U.S. 558, 475 n.25, 80 L.Ed.2d 590, 603 n.25, 104 S.Ct. 1989 (1984).

Petitioner has perfected the issue below by urging matters of law are subject to harmless error analysis pursuant to U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A. With this in mind, Judge Tjoflat is most correct in his dissent. It cannot be said on this record that the parties did not present harmless error to the panel below. Thus, the declination below to entertain "harmless error" is squarely inconsistent with 28 U.S.C. Section 2111.

Petitioner, in summary, fails to apprehend how this Hitchcock error was harmful as Mr. Ruffin was never precluded from offering non-statutory, mitigating evidence in the sentencing phase of his trial. Petitioner continues to maintain that this Court may well be inclined to grant its writ. To grant certiorari would

certainly give guidance to the lower federal courts as to the role of 28 U.S.C. s.2111 in habeas reviews. With the continuing increase of 28 U.S.C. s.2254 cases, there would be a national impact in setting further guides for collateral review. Respondent fails to establish reasons for this Court to decline granting the writ.

ISSUE II

Whether this Court should grant certiorari when other reasons, including a recent Supreme Court decision, Johnson v. Mississippi, __ U.S. __, 108 S.Ct. 1981 (1988), independently warrant the relief granted by the Eleventh Circuit? (As stated by Respondent)

To the extent that Respondent argues there are independent reasons which warrants the habeas relief granted by the Eleventh Circuit, Respondent's reliance on Johnson v. Mississippi, 486 U.S. __, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) is misplaced. Petitioner would point out that Mack Ruffin prosecuted a direct appeal from his conviction in the first degree murder of Deputy Lonnie Coburn. There, on March 9, 1978, a Hernando County Florida grand jury indicted Respondent and Freddie Lee Hall for the first degree murder of Deputy Coburn. Respondent pled not guilty and venue was changed, on Respondent's motion, to Lake County

Florida. Thereafter, after this joint trial, Respondent and Freddie Lee Hall were found guilty of the first degree murder of Deputy Coburn. The trial then moved into the sentencing phase where the jury recommended life imprisonment for Respondent and death for Freddie Lee Hall. The state trial court adopted the jury recommendations. Mr. Ruffin prosecuted a direct appeal; and, his judgment and sentence was affirmed. See, Ruffin v. State, 390 So.2d 841 (Fla. 5th DCA 1984) (per curiam affirmed). The Florida Supreme Court reduced Freddie Lee Hall's conviction to second degree murder. Justice Boyd filed a strong dissent urging that there was substantial, competent evidence upon which the jury could have found Hall and Ruffin equally guilty, as joint perpetrators, of premeditated murder, regardless of which one actually fired the bullet that killed Officer Coburn. The Florida Supreme Court in Mack

Ruffin's direct review of the Karol Hurst homicide noted that Ruffin's conviction for the killing of Deputy Coburn had been affirmed by the District Court of Appeal, Fifth District. See, Ruffin v. State, 397 So.2d 277 (Fla. 5th DCA 1980).

Why has Mack Ruffin not returned to the state court and prosecuted a post-conviction attack under Fla.R.Crim.Pr. 3.850? To Respondent's knowledge, he has not; and, now, under state law, it is too late for a post-conviction attack. See, In re Rule 3.850, 481 So.2d 480 (Fla. 1985). Thus, there is a bar to such an attack which might perfect a Johnson v. Mississippi, 486 U.S. __, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) claim. The Florida state courts enforce its procedural default rules against delayed petitions. See, Delap v. State, 513 So.2d 1050 (Fla. 1987). Even if the first degree murder judgment in Ruffin v. State, 390 So.2d 841 (Fla. 5th DCA 1984) were set aside, this

claim remains an academic abstraction. In Hall v. Wainwright, 733 F.2d 766, 774 (11th Cir. 1984), cert. denied, 105 S.Ct. 2344 (1985), the court below summarily disposed of this issue:

> (5) Whether the Conviction for Killing the Policeman was Improperly Utilized to Show the Aggravating Circumstances of Prior Criminal History
>
> Hall claims that because the Supreme Court of Florida reduced his sentence for murdering the police officer from first to second degree murder, the conviction should not have been used to show the aggravating circumstances of prior criminal history. **Hall v. State**, 403 So.2d 1319 (Fla. 1981). Hall contends that this error deprived him of his rights under the eighth amendment to a fair and reliable determination of his penalty. The state contends the utilization of the police officer's murder was proper to support an aggravating circumstance of prior criminal history.
>
> [15] Hall's claim lacks merit. Under Florida law, an aggravating circumstance exists when a defendant has been "previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Fla.Stat.Ann. s.921.141(5)(b)

> (West Supp.1983). A second degree murder conviction satisfies this standard. Therefore, the police officer's murder was properly utilized to find the aggravating circumstance of prior criminal history. Furthermore, Hall's 1968 conviction for assault with intent to commit rape was before the trial court and was sufficient to support the existence of this aggravating circumstance.
>
> (text of 733 F.2d at 774)

Freddie Lee Hall's judgment was reduced to a second degree murder conviction; and, on collateral review, it had no merit. Here, Mack Ruffin is now precluded from returning to state court to attack the judgment. See, In re Rule 3.850, 481 So.2d 480 (Fla. 1985). Even if the first degree murder conviction in the Coburn killing were reduced to second degree murder, the claim lacks merit. Thus, Respondent's reliance on Johnson v. Mississippi, 486 U.S. __, 100 L.Ed.2d 575, 108 S.Ct. 1981 (1988) is misplaced as he cannot completely invalidate his Lonnie

Coburn conviction. Even if Mr. Ruffin were successful on a collateral attack, his extent of relief would be to have his first degree murder conviction reduced to and reinstated as a second degree murder conviction. Procedurally, this does not present a colorable Johnson contention such as noted by this Court in Burr v. Florida, 101 L.Ed.2d 878, 108 S.Ct. 2840 (1988) and as rejected by Judge Alcee Hastings in Blanco v. Dugger, 691 F.Supp. 308, 316 (S.D.Fla. 1988) collateral appeal pending Dugger v. Blanco, 11th Cir. Case No. 88-5758. Thus, Johnson v. Mississippi does not warrant habeas relief.

To the extent Respondent suggests that Maynard v. Cartwright, 486 U.S. __, 100 L.Ed.2d 372, 108 S.Ct. 1853 (1988) requires a new sentencing procedure, he overlooks that this court subjected the Florida statutory language ["especially heinous, atrocious, or cruel"] to review in Proffitt v. Florida, 428 U.S. 242, 49

L.Ed.2d 913, 96 S.Ct. 2960 (1976). This Court found that the statutory construction of this language by the Florida Supreme Court in Tedder v. State, 322 So.2d 908, 910 n.3 (Fla. 1975) gives sufficient guidance to a jury. This Court noted that the Florida commentary on the statute construes it as "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." In Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980), this Court approved Proffitt. Basically, Maynard is simply a reaffirmation and application of the Godfrey decision. Thus, this is not new law which would support the Court below issuing the great writ.

CONCLUSION

As Mr. Ruffin's custodian has established that "harmless error" was urged under U.S. Ct. of App. 11th Cir. Rule 28-2(g)(iii), 28 U.S.C.A., there is no preclusion to Petitioner urging "harmless error" to this Court. Thus, Mr. Ruffin's custodian asks this Court to issue its most gracious Writ of Certiorari granting summary reversal of the decision below with instructions that the Court of Appeals consider and apply 28 U.S.C. s.2111 and Chapman v. California prior to automatically vacating a death sentence for a Lockett/Hitchcock violation.

Respectfully submitted,
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